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SUPREME COURT, U.S.

No. 82 5089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,
Appellee

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

Charles D. Bennett, Jr.
Rappahannock Legal Services, Inc.
910 Princess Anne Street
Fredericksburg, Virginia 22401
(703) 371-1105

C. Blackwell Tackney
711 Prince Edward Street
Fredericksburg, Virginia 22401
(703) 373-4452

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Petitioner, Everett T. Jones, prays this Court to note probable jurisdiction for appeal to review the judgment of the Supreme Court of Virginia, which judgment found no reversible error in the judgment of the Circuit Court of the City of Fredericksburg in this case.

QUESTIONS PRESENTED

Is a state child custody statute applied unconstitutionally when it results in denying legal standing under that statute to a man who has raised a seven-year-old child from early infancy, while allowing a local welfare department to proceed on a custody petition alleging only that the child's custody is in need of determination?

Is such a statute applied unconstitutionally when it results in finding parents unfit on the basis of their economic and health conditions without any showing that such conditions have a harmful effect on the child whose custody is at issue?

OPINIONS BELOW

There is no reported opinion below. The denial of Everett Jones's petition for appeal by the Supreme Court of Virginia and the opinion of the Circuit Court of the City of Fredericksburg are set forth in the appendix to this petition.

JURISDICTION

This is an appeal from the judgment of the Supreme Court of Virginia that there was no reversible error by the Circuit Court of the City of Fredericksburg in an appeal from the ruling of the Juvenile and Domestic Relations District Court for the City of Fredericksburg on a petition to determine legal custody of the child Russell Knorr. The original petitioner below was the Fredericksburg Department of Public Welfare and Social Services.

The judgment of the Supreme Court of Virginia was entered on April 20, 1982. This petition is filed within ninety (90) days of that judgment. A notice of appeal was filed in the Supreme Court of Virginia on July 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant sections of the Virginia Code are found at 16.1-226 et seq. (Chapter 11, Juvenile and Domestic Relations District Court). Articles 1, 3, 4, 8 and 9 are reproduced in full in the appendix to this appeal. The most relevant sections of the statutes are as follows: 16.1-227; 16.1-228.A; 16.1-241.A; 16.1-241.F; 16.1-279.A; 16.1-279.F; 16.1-281; 16.1-282; 16.1-283.

STATEMENT OF THE CASE

Lower Court Proceedings.

This is an appeal from a decision of the Circuit Court of the City of Fredericksburg, Virginia granting custody of a seven-year-old boy, Russell Knorr, to the Department of Public Welfare and Social Services of the City of Fredericksburg (the welfare department). That decision denied custody and standing under that statute to Everett Jones, who had raised Russell Knorr from infancy. The child's natural mother had consented to Everett

Jones's adopting the child in December, 1977 and appointed Mr. Jones guardian in July, 1978. Mr. Jones had not adopted the child, nor had he obtained a custody order from any court.

The welfare department removed Russell Knorr from the custody of Everett Jones and his companion, Blanche Lowman, first on September 26, 1980, under an emergency removal order from the Juvenile and Domestic Relations Court of the City of Fredericksburg. That order was entered after an ex parte hearing pursuant to a petition of the welfare department alleging that the "child's custody is in need of determination." On September 29, 1980, after a hearing in which both parties were represented, Judge William J. Cox of the Juvenile and Domestic Relations Court ordered the child returned to Mr. Jones and Ms. Lowman. Judge Cox also ordered further investigation and a subsequent hearing. At the later hearing, on November 13, 1980, the Juvenile and Domestic Relations Court again ordered the child removed, with permanent custody to the welfare department. Everett Jones filed a timely appeal to the Circuit Court of the City of Fredericksburg.

On December 18, 1980, the Circuit Court heard evidence on a motion for preliminary removal order filed by Mr. Jones, seeking return of the child to his home pending final hearing. The Circuit Court ordered that the child, who had been placed in foster care, be allowed to visit in the Jones-Lowman home for one week only, beginning Christmas day and ending January 2, 1981.

The Circuit Court subsequently held a final hearing in March, 1981, and permitted both parties to file post-hearing memoranda. Mr.Jones's memorandum expressly raised the issue of the constitutional right to family integrity and what kinds of concerns were and were not a legitimate basis for removal of a child. (See appendix, p.A-38). Judge John Jamison, by memorandum opinion, granted the petition of the welfare department, holding, inter alia, that:

". . . only the best interest of the child can be considered. I cannot agree that Jones and Lowman have the necessary standing to adopt. The child was placed with them by the natural mother and undoubtedly were she a party to this suit and were she to testify, she would favor Jones and Lowman as custodians, if for no other reason than the care and love that they gave Russell in his early years and for the favor of relieving her of that responsibility . . .

. . . I can find no realistic basis for granting permanent custody of this child to Mr. Jones and Ms. Lowman nor to Mr. Jones alone. I am reluctant to have to say it but I must find that Jones and Lowman are not fit and proper persons, within the meaning of the statute, to have custody of the child, for all of the reasons that the record makes quite clear. This finding has nothing to do with their moral character but refers to their economic and health conditions and their inability to fulfill normal parenting responsibilities." (Appendix, p.2,3)

Judge Jamison's opinion did not expressly address the constitutional issues raised by Mr. Jones.

Everett Jones, through counsel, sought review of the Circuit Court decision by the Supreme Court of Virginia by petition timely filed. That petition raised the issue of constitutionality of the lower court's application of the statute (See appendix, 52,65,66. The Virginia Supreme Court denied the petition for writ of appeal, summarily affirming the Circuit Court judgment on April 20, 1982 without explanation.

Material Facts.

Russell Knorr first came to Everett Jones and Blanche Lowman when he was a few days or weeks old, in 1974. Mr. Jones was approximately sixty years of age at the time. Blanche Lowman was thirty-one. Russell's mother, Mrs. Helen Knorr, signed sworn documents in 1977 and 1978 naming Everett Jones as the child's legal guardian and giving Mr. Jones permission to adopt the child.

Mrs. Knorr remained in contact with the family; she sat as an observer in the final hearing of this cause, but she was not a party and did not testify.

Little is known of Russell's natural father. The welfare department social worker, Patricia Aspinwall, related that one Russell Harding was the alleged father of the child. There is no information in the record about Mrs. Knorr's husband.

In 1978, Mr. Jones instituted an adoption petition seeking to make Russell his legal son. Following the statutorily required adoption investigation, the welfare department's report recommended against the adoption because of Mr. Jones' age. Mr. Jones withdrew his petition, however, and no further steps were taken at that time.

Russell Knorr remained with Mr. Jones and Ms. Lowman. He began attending church nursery school in 1977, when he was three years old. Mr. Jones and Ms. Lowman enrolled him in a summer Head Start program at the age of four, and Russell returned to Head Start the next summer, in 1979.

Mr. Jones and Ms. Lowman arranged for Russell's evaluation by the Rappahannock Area Child Development Center in early 1979, when Russell turned five. Russell was examined by Dr. Michael Fray and Dr. Raymond Jones in a series of visits beginning February 15, 1979.

On or about March 1, 1979, the welfare department conducted an investigation after receiving a report that Russell had fallen or jumped off the balcony of the Jones-Lowman apartment. The investigation showed that the accident happened while the adults in the apartment thought the child was napping. Although Mr. Jones and Ms. Lowman sought immediate medical attention for Russell, and although Russell was unhurt from his fall, a social worker from the welfare department, Patricia Aspinwall, began to monitor the family's care of Russell.

Ms. Aspinwall made four home visits in the Spring of 1979. The welfare department took no legal steps, and Ms. Aspinwall's visits were accepted by Russell's family.

The Child Development Center Report on Russell, which Mr. Jones and Ms. Lowman had requested, and which was completed sometime after April 6, 1979, made certain recommendations with respect to managing and caring for Russell. The evidence at trial was contradictory as to whether Everett and Blanche followed all of the recommendations, and also on whether the social worker, Patricia Aspinwall, offered any meaningful assistance in Everett's and Blanche's efforts to improve their skills in raising Russell. The welfare department continued to monitor the Jones-Lowman-Knorr family through 1979 and 1980, though it made few home contacts. Russell entered kindergarten in the fall of 1979, duly completing the school year. By the Spring of 1980, Russell was six years old.

In August of 1980, Everett Jones was seriously ill with a respiratory tract infection aggravated by asthma. Mr. Jones became very weak as a result of prolonged bed rest at Mary Washington Hospital, where he stayed for approximately six weeks. During the time Mr. Jones was in the hospital, Blanche Lowman suffered a recurring leg ulcer, requiring that she undergo skin-graft surgery in the hospital on or about September 15, 1980.

While Mr. Jones and Ms. Lowman were in the hospital, until September 26, 1980, Russell was cared for by Mrs. Ethel Grimes, a friend Blanche knew from Head Start. Before entering the hospital, Ms. Lowman had called the social worker, Ms. Aspinwall, for help in finding someone to care for Russell. Ms. Aspinwall urged that Russell be placed in foster care, a suggestion that Ms. Lowman rejected. Ms. Aspinwall also visited with Mr. Jones in the hospital at that time for over an hour and attempted to persuade him to voluntarily relinquish custody of the boy to the welfare department. Mr. Jones also refused.

On September 26, 1980, welfare department social worker Cheryl Matthew removed Russell from the Grimes home under the previously-mentioned emergency removal order. By court order, Russell was returned to the Grimes home, however, on September 29, 1980, the following Monday. After being reunited with Mr. Jones and Ms. Lowman upon their release from the hospital, Russell was removed from the Jones-Lowman home under a second juvenile court order on November 13, 1980. Mr. Jones appealed, as described above.

At the final Circuit Court hearing, the welfare department did not dispute that Mr. Jones and Ms. Lowman were Russell's psychological parents. Mr. Jones and Ms. Lowman had a combined income of $504.00 per month and paid rent of $59 per month at the Forest Village apartment complex. No other specific evidence as to the economic conditions of the family appears on the record. Both Mr. Jones and Ms. Lowman were in the home throughout the day, they fed and clothed Russell well, and their home was neat and clean.

Much of the evidence at the final hearing suggested that the child might have behavior problems with respect to aggressiveness and impulse control, although teachers and neighbors testified that he was a normal child. The memorandum opinion of John Jamison did not refer to evidence of Russell's behavior, however, and it is difficult or impossible to assess the Court's evaluation of the abundant evidence presented at trial as to the personalities and abilities of the child and the two psychological parents.

The evidence on the record with regard to the health conditions of Mr. Jones and Ms. Lowman shows that Mr. Jones was sixty-six years of age at the time of the final hearing. He had been disabled on account of a chronic asthmatic condition for approximately thirteen years. About 1978, when

sixty-one, he was successfully treated for a very confined prostate cancer. Although mild depression was noted, Dr. Donald Reed, his examining psychiatrist, found Mr. Jones to be "mentally capable and psychologically responsible to care for" a seven-year-old boy and capable of caring for a teenage boy. Mr. Jones's physician, Dr. Peter Smith, thought Everett Jones's general health was good, though he would always have asthma. While Mr. Jones was in the hospital for the respiratory tract infection previously discussed, he may have had a mild heart attack. Ms. Lowman had a history of phlebitis which periodically led to the appearance of ulcers on her legs that required surgery. She was disabled on that account. The examining psychiatrist found a mild manic disorder, but concluded that she, like Mr. Jones, was capable of being a parent to a seven-year-old boy.

REASONS TO NOTE PROBABLE JURISDICTION

This Case Presents An Important Constitutional Issue: What Limits Do The Due Process And Equal Protection Clauses Of The Constitution Place On The Power Of A State, Through Its Welfare Department, To Intrude Upon And Destroy A Familial Relationship?

The threshhold issue, for which there appears to be no precedent in this Court, is whether the relationship between Everett Jones and Russell Knorr was such as would entitle them to be considered members of a family when custody is at issue. If that question is answered in the affirmative, the remaining issue is whether the Commonwealth of Virginia denied Due Process of law or Equal Protection of the laws to Mr. Jones in finding him "unfit" because of his economic and health conditions.

A. As Russell's Psychological Parent Everett Jones is Entitled To The Protections Provided To Natural Parents When A State Seeks To Remove A Child From The Home.

One of the ironies of this case is the fact that the

Virginia juvenile courts statute appears to confer all the rights, duties and protections of the law on custodians and persons standing in loco parentis, with no distinction drawn between such persons and natural parents or legal guardians. The result in this case, however, suggests that the court discounted the significance of actual parenthood in favor of some sort of "title" or "privity" theory, the sort of theory one would expect to find in a property issue.

After the March 20 hearing on the merits, both parties submitted legal memoranda to the trial court. Mr. Jones's memorandum, citing Virginia case law and the state statutes governing juvenile and domestic relations matters, argued that the welfare department had no standing to challenge Mr. Jones's actual custody of Russell without at least an allegation of abuse, neglect, or some other perceptible harm. The section of the statute under which the welfare department had proceeded, 16.1-241.A.3, by statutory construction and case law, applied only to cases where two or more persons had an a priori legal claim to custody of a child. That is, it was meant to apply to custody disputes between estranged spouses and other similarly situated persons. Since the welfare department had no prior legal custody, it was argued, the welfare department had no legal basis to seek custody under 16.1-241.A.3 for the first time. In other words, the welfare department should have had to allege and prove abuse or neglect within the meaning of the statute before it could assert a claim for custody.

In a bizarre twist, the lower court's opinion failed to address the issue of whether or not the welfare department had legal standing; instead, the opinion held that Mr. Jones had no standing.[1] The opinion is devoid of explanation or legal reasoning on that point. Indeed, the opinion is contradictory

[1] The Court's opinion literally stated that Mr. Jones had no standing to adopt. Since adoption was never at issue, this was interpreted to mean that Mr. Jones had no standing with regard to custody.

(continued)

in that, after finding that Mr. Jones had no standing, Judge Jamison went on to rule that Mr. Jones and Ms. Lowman were also unfit. Neither finding is supportable on the record under the Constitution, given constitutional protections of the family as developed through opinions of this and other courts.

At issue was much more than the initial child custody question , though the disposition of that issue was the primary concern of all parties at the trial. At issue also were the rights of Mr. Jones even after the child was placed with the welfare department.

Judge Jamison's bald holding, "I cannot agree that Jones and Lowman have the necessary standing" was not simply the equivalent of a finding, for example, that a given party in a property dispute had no standing because he had no title, or because he lacked privity to a contract. The statutory family protection scheme in Virginia makes the determination of standing considerably more important than it would normally be in property disputes. Parents with legal standing, even the most abusive and neglectful parents, have rights under the statute that are not terminated with the kind of initial change of custody that the Circuit Court effected here by placing the child with the welfare department.

Under Section 16.1-279.A, Code of Virginia, a juvenile judge can only place the child with a welfare department after finding that there is no less drastic alternative. If Mr. Jones had no standing, he is not protected by the requirement for such a finding. Indeed, no such finding was made in this case.

Even more important than the provisions of 16.1-279 are the provisions of Sections 16.1-281, 16.1-282, and 16.1-283, which govern actions to be taken after a child is placed with

[1] Otherwise, the Court's ruling would mean that Mr. Jones had less standing than a total stranger seeking to adopt.

the welfare department. (See Appendix, p.20). These provide for a foster care plan to be prepared by the local agency, and that the preparers of such a plan "shall consult with the child's parents and other person or persons standing in loco parentis at the time the board or agency obtained custody concerning the matters which should be included in such plan." 16.1-281.A.

Section 16.1-281.B provides in pertinent part:

> "Such foster care plan in Part A thereof shall describe (i) the programs, care, services, and other support which will be offered to such child and his or her parents and other prior custodians, (ii) the participation and conduct which will be sought from the child's parents and other prior custodians, (iii) the visitation and other contacts which will be permitted between the child and his or her parents and other prior custodians, and (iv) the nature of the placement or placements which will be provided for such child. Such plan shall be designed to lead to the return of such child to his or her parents or other prior custodians within the shortest practicable time which shall be specified in the plan; provided, however, if the department or agency determines that it is not likely that the child can be returned to his or her prior family within a practicable time, consistent with the best interests of the child, in Part B of the plan such department or agency shall (i) include a full description of the reasons for this conclusion, (ii) determine the opportunities for placing the child with a relative if a subsequent transfer of custody to the relative is planned, or in an adoptive home within the shortest practicable time, and if neither of such placements is feasible (iv) explain why permanent foster care or continued foster care is the plan for the child. The department or agency may include with such proposed plan a proper pleading seeking the termination of residual parental rights pursuant to §16.1-283. (Emphasis supplied.)

Subpart C of Section 16.1-281 mandates that a copy of Parts A and B of the foster careplan be sent to the child's parents or any other person standing in loco parentis at the

time the board or agency obtained custody. Further "(a)ny party receiving a copy of the plan may petition the court for a review of the plan." 16.1-281.C. Upon such petition, the judge may hold a hearing to review and possibly modify the plan. Id.

Section 16.1-282, Foster care review, requires that the foster care plan be reviewed at least within sixteen months, and again, that it include consultation with the parents or other persons standing in loco parentis. A hearing to review the plan must be held, and the parent or other prior custodian given notice thereof. Id.

Finally, Section 16.1-283, Termination of parental rights, sets high standards for termination of parental rights. The grounds for termination include, though they are not limited to, a showing that parents are severely mentally ill, a showing that parents have failed to maintain contact with a child, or a showing that a parent has been unable or unwilling to remedy a condition which led to the original change of custody.

In considering the application of the Fourteenth Amendment to the Constitution of the United States to these Virginia statutes, and the facts of this case, one must conclude that it is a denial of Equal Protection of the laws to grant such thorough protections to the interests of natural parents and children but to deny them to Mr. Jones and Russell. This appellant was, and had been from Russell's infancy, the actual parent of the child, caring for Russell day in and day out.

In an analogous case, Stanley v. Illinois, 405 U.S. 645, 925 S.Ct. 1208, 31 L.Ed.2d 551 (1972), this Court decided that a natural but unwed father could not be presumed unfit to raise his children. Though never married to the mother of his children, the natural father was entitled to a hearing on his fitness as a requirement of Due Process, and could not be held to a different standard of fitness from a legitimate father as a matter of Equal Protection of the law. Here, on the basis of these same two

Fourteenth Amendment protections, the Court should not be allowed to exclude the psychological father from the courtroom.

It was undisputed that Everett Jones was the psychological parent of the boy. The importance of the psychological parent was presented to the court by expert testimony. Here, as in Stanley, the final ruling of the court denied the father standing with regard to the disposition of the child. Denial of standing to a psychological parent while awarding that status to biological parents is not only an irrational and inequitable distinction with respect to the nature of the relationships involved; it also ignores the "best interest" test commonly recognized as providing guidance in child custody matters. The distinction drawn by the Circuit Court between natural parents and actual parent completely ignored the best interest of the child by ignoring the significance and value of the emotional ties involved. Dr. Donald Reed, in a deposition presented at trial, indicated that the emotional ties between psychological parent and child are of the most serious importance to the personality development of the child. The same point was made and explained much more fully in two books introduced in this case, Before the Best Interest of the Child (J. Goldstein, A. Freud, A. Solnit, 1979 ed.) and Beyond the Best Interest of the Child, (J. Goldstein, A. Freud, A. Solnit, 1979 ed.)

It may well be that the Commonwealth of Virginia is under no constitutional mandate to provide such thoroughgoing protective measures as its juvenile courts law does provide. Having adopted such a law, however, the Commonwealth should be under a duty to apply the law similarly to similarly situated persons. That the Commonwealth failed to do in this case.

In addition to denying Equal Protection to the appellant, the statute as applied also denies him Due Process of law. A reasonable reading of the statutory language, i.e., "persons standing in loco parentis," "prior family", and "custodian" leads to the conclusion that it applies to Everett Jones in the circumstances of this case. If it does not,

the statute fails to give adequate notice of its meaning, and must be deemed so vague as to be repugnant to the Constitution. Indeed, if the statutory language does not confer standing upon Everett Jones under the circumstances of this case, the statute is a trap for the unwary.

B. It Was Improper For The Court To Remove The Child Because of Health And Economic Conditions Where There Was No Showing Of Abuse, Neglect, Abandonment, Or Any Other Significant Harm To The Child.

Because the trial court made a finding as to the appellant's fitness as a parent, (even though ruling that he had no legal standing in the proceeding), it is necessary to look at the nature of the trial court's findings with regard to fitness.

The statute in question contains rather explicit standards with regard to what might more broadly be termed "fitness." Nowhere does the statute use the word "fitness," however. Rather, the statute refers to children who have been "abused or neglected," including within that definition

> "any child whose parents or other person responsible for his care:
>
> 1. Creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions;
> 2. Neglects or refuses to provide care necessary for his health; provided however, that no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;
> 3. Abandons such child; or
> 4. Commits or allows to be committed any sexual act upon a child in violation of the law." 16.1-228.A.

By omiting any reference to this specific statutory language and referencing instead the "economic and health conditio of Mr. Jones and Ms. Lowman, the trial court in this case either

ignored the clear language of the statute, or applied the terms of the statute with an interpretation so broad that it would allow intervention by state agencies into all manner of family child-rearing practices and conditions. Such unfettered liberty by the state to intrude into the home must be repugnant to constitutional principles governing family privacy and integrity.

It is interesting that the statute on its face focuses on precisely the sort of explicit endangering acts or omissions by parents that other courts have found to be the appropriate criteria for judging parental conduct in the sort of custody case that pits state agency against parent. In the leading case, Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, aff'd, 545 F.2d 1137 (S.D. Iowa, 1975), (see appendix, p. 76) the court disapproved that part of a state statute which allowed permanent termination of parental rights where parents allegedly "refused to give the child necessary parental care and protection" and were "unfit (parents) by reason of . . . conduct deterimental to the physical or mental health or morals of the child." Id. 406 F.Supp. 10 at 15. Here, the statute, on its face, appears considerably more explicit than the offending language in Alsager and would seem to meet the Alsager standard for clear, understandable language that gives notice of what kinds of actions are forbidden. Unfortunately, the trial court applied the statute in such a way that, as in Alsager, the standards applied were too vague to give parents notice of what conduct the law would interdict.

Morever, as the Alsager court noted:

> "even in the context of a precise and specific enactment, Due Process requires a certain threshhold of harm to the child to justify termination . . .to sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequencies of termination." (Id. at 406 F.Supp. 23)

Here, the lower court failed to weigh the harm inherent in placing Russell in foster care against any potential harm inherent in his living situation with Mr. Jones and Ms. Lowman. It requires only a little reflection to realize that economic and health conditions, standing alone, are an unreliable guide to the relative benefits to a child of one home placement versus another. Parents who are millionnaires may be neglectful or abusive in spite of the wealth at their disposal. By the same token, a family of subsistence means might provide for their children's needs in relative abundance.

The Jones-Lowman household cash income was low. Nevertheless, the rent was also extremely low. All witnesses agreed that the child had never lacked for food, clothing, games and toys, educational opportunities, religious training, or medical care. This Court may take judicial note of the fact that the maximum Virginia grant in aid to families with dependent children for a family of three is only $310.00 per month, or $194.00 less than the household income in this case. Should all the children whose families receive Aid to Families with Dependent Children be taken from their families?

One must suspect that a great many foster families are more economically insecure than the Jones-Lowman household. One of the grim realities of foster care is the fact that the small stipend paid to foster parents by the state for the care of each child is an important inducement, especially to economically marginal families, to participate in the foster care program. Further, as was shown on the record, the Commonwealth of Virginia has seen fit to offer a similar inducement for adoption of children as old as Russell because of the difficulty of placing older children. The lower court opinion failed to show any weighing of Russell's family's economic condition against the kind of economic conditions Russell might find in any future foster-family or adoptive family.

Similarly, the kinds of health conditions present in this case were not harmful to the child. Mr. Jones was of advanced age, but so are a great many custodial grandparents. Both Mr. Jones and Ms. Lowman were disabled, but both were also present in the home and able to care for the child. The proof of their abilities lay in the fact that they had cared for the child for over six years. This is not a situation in which some family member had tuberculosis or some other communicable disease.

If economic and health conditions could ever provide the basis for removal of a child from his home, considerations of Due Process require that those conditions be linked to some imminent and substantial harm to the child. Otherwise, another of the concerns discussed in Alsager is raised. That is, a law that allows a child to be removed on the basis of such conditions where there is no clear harm or danger of harm fails to afford Due Process as a substantive matter. Vague concerns by social worker or judge about what may happen or could happen in the future, cannot outweigh the very real, though intangible, psychological injury that is brought upon a child who is wrenched from the only parents he has ever known.

It has long been recognized that there is a constitutionally protected interest in preserving the family unit and raising one's children. The constitutional right of family integrity can only be overridden by a state interest that reaches a significant magnitude. Clearly, the state has an overriding interest in protecting infants and children from abuse and neglect. The state has an equally compelling interest in sheltering homeless children, and in supervising delinquent and ungovernable children. The state does not have a sufficiently important interest in removing children from their homes on the basis of a social worker's vague disapproval of child rearing practices. Given the uncertainties of the child's life after

removal, the welfare department has the burden of showing that the child will clearly be better off in the custody of the state. Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, at 21, 22.

In reaching its conclusion, the Alsager court first found that a long line of cases from this Supreme Court supported the contention that family privacy and integrity are rights so fundamental that any state action to infringe those rights must be motivated by a compelling state interest, and that such state action is subject to strict scrutiny with respect to how it furthers that compelling state interest. The Alsager Court's position in that respect has recently been ratified by this Court in the case of Santosky v. Kramer, _____ U.S. _____, 50 L.W. 4333 (1982). The Santosky opinion referred to "this Court's historical recognition that freedom of personal choice in matter of family life is a fundamental liberty interest protected by the Fourteenth Amendment." 50 L.W. 4333 at 5335.

Justice Blackmun's opinion in Santosky v. Kramer points out the magnified risk of erroneous factfinding in parental termination cases, emphasizing the power of the state that is brought to bear against a parent who is often poor and uneducated. Id. at 4337. As the opinion states, "because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination." Id.

In line with Santosky v. Kramer, appellant would show that the clear and convincing standard constitutionally required for permanent termination of parental rights must also be the standard for placing the child in the custody of the state in the first instance. This is especially so where, as here, the state statute allows for permanent termination if the parents cannot show correction of the circumstances orginally leading to the child's being placed with the welfare agency in the first place. Section 16.1-283.C.2, Code of Virginia of 1950, as amended. To

allow a lower standard at the first custody determination would effectively negate the clear and convincing standard at the later hearing. In other words, it would be too easy for the state agency to show by clear and convincing evidence that the original conditions had not changed, even if the original conditions themselves did not constitute grounds to terminate parental rights, and even if the original conditions were established only by a preponderance of the evidence.

In line with Alsager v. District Court of Polk County, Iowa, there is a final grievous constitutional error with the result in this case. The welfare department petitioned on grounds that the child Russell Knorr's custody was "in need of determination." That petition was fatally defective because it failed to give any notice to Everett Jones as to the grounds upon which the welfare department was seeking custody. In effect it cast upon Mr. Jones the burden of having to negate every possible charge that his parenting was inadequate. The record shows that Mr. Jones proceeded to attempt precisely that. His witnesses included neighbors, a relative, teachers, psychologists, a psychiatrist, and a medical doctor. The problem with proceeding against such a nebulous charge is illustrated perfectly by the result in this case. After all the witnesses, Judge Jamison found no moral unfitness, never mentioned abuse or neglect, and, indeed, mentioned the love and care given to Russell by Everett Jones and Blanche Lowman. Nevertheless, the judge found unfitness on the basis of the economic and health conditions of Mr. Jones and Ms. Lowman.

One thing that Jones had not gone into in any depth at the trial was the family's economic situation and how they planned to continue to meet Russell's needs. It is impossible to know from the record, for example whether or not the family had health insurance for Russell.

Had the petition alleged that the family's economic and health circumstances were grounds for removal, (leaving aside the issue of whether such circumstances could ever be grounds for removal), at least Mr. Jones would have been able to speak to such concerns. Where such fundamental interests as family integrity are at stake, it is a denial of Due Process as a procedural matter to fail to allege sufficient facts for the defendant in such a case to prepare a defense. (Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10.

CONCLUSION

The order of the Circuit Court should be reveresed and the child should be returned to the custody of Everett Jones. The Circuit Court's actions, as ratified by the Virginia Supreme Court, violated United States constitutional standards for all the reasons presented here.

Respectfully submitted,

Charles D. Bennett, Jr.
Counsel for Appellant
Rappahannock Legal Services, Inc.
910 Princess Anne Street
Fredericksburg, Virginia 22401
(703) 371-1105

C. Blackwell Tackney
711 Prince Edward Street
Fredericksburg, Virginia 22401

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No. 82 5089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,
Appellee

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

APPENDIX TO JURISDICTIONAL STATEMENT

Charles D. Bennett, Jr.
Rappahannock Legal Services, Inc.
910 Princess Anne Street
Fredericksburg, Virginia 22401
(703) 371-1105

C. Blackwell Tackney
711 Prince Edward Street
Fredericksburg, Virginia 22401
(703) 373-4452

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE
AND SOCIAL SERVICES

v.

IN RE: RUSSELL KNOX, A CHILD
DOB 1/1/74

EVERETT T. JONES

MEMORANDUM OF OPINION

I have given careful study to each of the briefs and arguments in the above matter. Each custody case I consider gives me a great deal of concern but [illegible] real anguish than this one.

Mr. Everett Jones is a kind man and [illegible] as though he were his natural child. Miss Lowman also loves Russell and both of them appear to want him.

In addition to making and studying copious notes at the lengthy hearings we have had in this case and considering the written arguments as well as having read large portions of the two books left with me by Ms. Tackney, "Before The best Interest of the Child" and "Beyond the best Interests of the Child", I feel that I am now capable of making an entirely objective decision. Notwithstanding that conclusion, I cannot complete this short opinion without expressing with utmost sincerity, my deep sympathy for Mr. Jones and Ms. Lowman. The unexpressed but obviously deep misery and despair that, especially Mr. Jones, has undergone, his feeling of deprivation of Russell's company and the wrenching emotional trauma that this decision must bring him, cannot go unnoticed by the court.

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Yet, try as I might, and be assured I have sought every objective means to decide this case in favor of Mr. Jones and Ms. Lowman, I simply cannot do so.

At this point, only the best interest of the child can be considered. I cannot agree that Jones and Lowman have the necessary standing to demand custody or the right to adopt. The child was placed with them by the natural mother and undoubtedly were she a party to this suit and were she to testify she would favor Jones and Lowman as custodians, if for no other reason than the care and love that they gave Russell in his early years and for the favor of relieving her of that responsibility. Ms. Tackney's brief is indeed an exceptional one and eloquently presents her reasoning on behalf of Everett Jones. Yet, the Supreme Court of Virginia has stated its position on the question of a child's being awarded to an unmarried couple. The fact that Mr. Jones may be impotent and that there may have been no sexual relationship between these parties for several years, is not the point. It is confusing to a small child to have a father image and a mother image with respect to two persons in loco parentis who are not married to each other. The Supreme Court takes the position that marriage is still the traditional parental relationship in Virginia as between a man and woman living together with a child to rear and it looks askance at a relationship such as this would be if Russell were returned to them.

As we know, Russell has settled into a reasonably happy relationship in his present foster family setting. He is friendly with his foster siblings and is being reared in a more natural

environment than he would have with Jones and Lowman. It is unrealistic to assume, in view of the serious health problems of Mr. Jones and Ms. Lowman, that they will remain in a vigorous and healthy condition until Russell becomes emotionally and economically emancipated. He would be lucky if Jones and Lowman are alive for the next five years. But we must certainly look beyond that period. Although there was evidence that Jones and Lowman were effective parents, there was other evidence that they were not. Some of Russell's unconventional behavior was due to lack of supervision and a firm loving discipline. I feel that these people really desire Russell for their own needs and are willing to omit from their concerns what would become of the child after the passage of from five to ten years. Meantime, they want his company and may actually need it desparately for their own emotional security. Try as I might and as carefully as I have considered Ms. Tackney's position, I can find no realistic basis for granting permanent custody of this child to Mr. Jones and Ms. Lowman, nor to Mr. Jones alone. I am reluctant to have to say it but I must find that Jones and Lowman are not fit and proper persons, within the meaning of the statute, to have custody of the child, for all of the reasons that the record makes quite clear. This finding has nothing to do with their moral character but refers to their economic and health conditions and their inability to fulfill normal parenting responsibilities.

The child needs a structured, disciplined home environment and looking to his eventual adoption, with that need in mind, I am of the opinion that custody should be granted to the Department of Public Welfare.

Accordingly, counsel for the Department is requested to present an order, appropriately endorsed, which would carry out the terms of this opinion. It may contain a provision for a stay of execution if counsel be advised and petition the Supreme Court for an appeal. Meantime, Russell would remain in his present foster home pending the outcome of an appeal, if any.

John A. Jamison, Judge

Date: May 14, 1981

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

IN RE: RUSSELL KNORR, a child
D.O.B. 1/1/74

(FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE
AND SOCIAL SERVICE

vs.

EVERETT T. JONES)

O R D E R

This cause was heard on March 20, 1981, on a petition of the Fredericksburg Department of Public Welfare and Social Service that the custody of the child, Russell Knorr, was in need of determination. After hearing testimony and considering the written arguments by counsel for petitioner and respondent, the Court makes the following findings:

1. That the Juvenile and Domestic Relations Court of the City of Fredericksburg had jurisdiction to hear and decide this case pursuant to Section 16.1-241A of the Code of Virginia (1950), as amended;

2. That a final order was entered by the Juvenile and Domestic Relations Court of the City of Fredericksburg on November 13, 1980;

3. That this Court has jurisdiction to hear and decide this case on appeal, pursuant to Section 16.1-296 of the Code of Virginia (1950), as amended;

4. That Russell Knorr is the natural child of Helen Knorr, who was present but did not testify at the hearing on March 20, 1981;

5. That, at the time of the original petition, Russell Knorr resided in the City of Fredericksburg;

6. That Everett Jones and Blanche Lowman are not legal guardians of this child with vested custody rights;

7. That Everett Jones and Blanche Lowman are not married and, although the evidence indicates they have not had sexual relations in five years, they live together as two adults of the opposite sex.

8. That Blanche Lowman and Everett Jones are not fit and proper persons, within the meaning of Virginia law, to have custody of the said Russell Knorr; and,

9. That it is in the best interests of the child, Russell Knorr, that his custody be awarded to the Fredericksburg Department of Public Welfare and Social Service.

WHEREFORE, the Court does ORDER that custody of Russe Knorr shall be and hereby is granted to the Fredericksburg Department of Public Welfare and Social Service.

ENTER THIS:

John A. J[illegible], Judge

Date: June _____, 1981

I ASK FOR THIS:

Ann P. Palamar

Ann P. Palamar
Counsel for Fredericksburg Department
of Public Welfare
P. O. Box 972
Fredericksburg, Virginia 22401

SEEN:

C. Blackwell Tackney

C. Blackwell Tackney
Counsel for Everett Jones
Rappahannock Legal Services, Inc.
910 Princess Anne Street, 2nd Floor
Fredericksburg, Virginia 22401

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 20th *day of* April, 1982.

Everett T. Jones,

Appellant,

against Record No. 811535

Fredericksburg Department of Public Welfare and Social Services,

Appellee.

From the Circuit Court of the City of Fredericksburg

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: _____

Deputy Clerk

A-2

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,
Appellee

RECORD NO. 811535

NOTICE OF APPEAL

Notice is hereby given that Everett T. Jones appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Virginia entered April 20, 1982. This appeal is taken under 28 U.S.C. Section 1257(2), which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by appeal wherein the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

EVERETT T. JONES

BY: _____
Of Counsel

Charles D. Bennett, Jr.
Rappahannock Legal Services, Inc.
Counsel for Appellant
910 Princess Anne Street
Fredericksburg, Virginia 22401
(703) 371-1105

PROOF OF SERVICE

I, Charles D. Bennet,Jr., hereby certify that a true copy of this Notice of Appeal was mailed on this 3rd day of July to Ann Palamar, Counsel for Appellee, 904 Princess Anne Street, Fredericksburg, Virginia, 22401; copy to Fredericksburg Department of Public Welfare and Social Services, P.O. Box 510, Fredericksburg Virginia, 22401.

CHARLES D. BENNETT, JR.

CHAPTER 11.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS.

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ARTICLE 1.

General Provisions.

§ 16.1-226. Short title. — The short title of the statutes embraced in this chapter is "Juvenile and Domestic Relations District Court Law." (Code 1950, § 16.1-139; 1956, c. 555; 1972, c. 708; 1973, c. 546; 1977, c. 559.)

§ 16.1-227. Purpose and intent. — This law shall be construed liberally and as remedial in character; and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings the welfare of the child and the family is the paramount concern of the State and to the end that this humane purpose may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

This law shall be interpreted and construed so as to effectuate the following purposes:

1. To divert from the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;

2. To provide judicial procedures through which the provisions of this law are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other rights are recognized and enforced;

3. To separate a child from such child's parents, guardian, legal custodian or other person standing in loco parentis only when the child's welfare is endangered or it is in the interest of public safety; and

4. To protect the community against those acts of its citizens which are harmful to others and to reduce the incidence of delinquent behavior. (Code 1950, § 16.1-140; 1956, c. 555; 1977, c. 559.)

§ 16.1-228. Definitions. — When used in this chapter, unless the context otherwise requires:

A. *"Abused or neglected child"* means any child whose parents or other person responsible for his care

1. Creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions;

2. Neglects or refuses to provide care necessary for his health; provided, however, that no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;

3. Abandons such child; or

4. Commits or allows to be committed any sexual act upon a child in violation of the law.

B. *"Adoptive home"* means the place of residence of any natural person in which a child resides as a member of the household and in which he or she has been placed for the purposes of adoption or in which he or she has been legally adopted by another member of the household.

C. *"Adult"* means a person eighteen years of age or older.

D. *"Child,"* *"juvenile"* or *"minor"* means a person less than eighteen years of age.

E. *"Child welfare agency"* means a child placing agency, child-caring institution or independent foster home as defined in § 63.1-195.

F. *"Child in need of services"* means

1. A child who while subject to compulsory school attendance is habitually and without justification absent from school; or

2. A child who is habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, legal custodian or other person standing in loco parentis; or

3. A child who remains away from or habitually deserts or abandons his or her family; or

4. A child who commits an act, which is otherwise lawful, but is designated a crime only if committed by a child.

Provided, however: to find that a child falls within any of classes 1, 2 or 3 above (i) the conduct complained of must present a clear and substantial danger to the child's life or health or (ii) the child or his or her family must be in need of treatment, rehabilitation or services not presently being received and (iii) the intervention of the court must be essential to provide the treatment, rehabilitation or services needed by the child or his or her family.

G. *"The court"* or the *"juvenile court"* or the *"juvenile and domestic relations court"* means the juvenile and domestic relations district court of each county or city.

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H. *"Delinquent act"* means an act designated a crime under the law of this State, or an ordinance of any city, county, town or service district, or under federal law, except an act, which is otherwise unlawful, but is designated a crime only if committed by a child.

I. *"Delinquent child"* means a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his or her eighteenth birthday.

J. *"Department"* means the Department of Corrections and *"Director"* means the administrative head in charge thereof or such of his assistants and subordinates as are designated by him to discharge the duties imposed upon him under this law.

K. *"Foster care"* or *"temporary foster care"* means the provision of substitute care and supervision for a child committed or entrusted to a local board of public welfare or child welfare agency or for whom the board or child welfare agency has accepted supervision, in a temporary living situation until the child can return to his or her family or be placed in a permanent foster care placement or in an adoptive home.

L. *"Intake officer"* means a juvenile probation officer appointed as such, pursuant to the authority of this chapter.

M. *"The judge"* means the judge, or the substitute judge of the juvenile and domestic relations district court of each county or city.

N. *"This law"* or *"the law"* means the Juvenile and Domestic Relations District Court Law embraced in this chapter.

O. *"Legal custody"* means a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities.

P. *"Permanent foster care placement"* means the place of residence in which a child resides and in which he or she has been placed pursuant to the provisions of §§ 63.1-56 and 63.1-206.1 with the expectation and agreement between the placing agency and the place of permanent foster care that the child shall remain in the placement until he or she reaches the age of majority unless modified by court order or unless removed pursuant to § 16.1-251 or § 63.1-248.9. A permanent foster care placement may be a place of residence of any natural person or persons deemed appropriate to meet a child's needs on a long-term basis.

Q. *"Shelter care"* means the temporary care of children in physically unrestricting facilities.

R. *"State Board"* means the State Board of Corrections.

S. *"Residual parental rights and responsibilities"* means all rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support. (Code 1950, § 16.1-141; 1956, c. 555; 1972, c. 708; 1973, c. 546; 1974, cc. 44, 45, 197; c. 559; 1978, c. 665; 1979, c. 15; 1981, c. 191.)

Article 3

Jurisdiction and Venue.

§ 16.1-241. Jurisdiction. The judges of the juvenile and domestic relations district court elected or appointed under this law shall be conservators of the peace within the corporate limits of the cities and the boundaries of the counties for which they are respectively chosen and within one mile beyond the limits of such cities and counties. Except as hereinafter provided, each juvenile and domestic relations district court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the limits of said city or county, concurrent jurisdiction with the juvenile court or courts of the adjoining city or county over all cases, matters and proceedings involving:

A. The custody, visitation, support, control or disposition of a child:

1. Who is alleged to be abused, neglected, in need of services or delinquent;

2. Who is abandoned by his parent or other custodian or who by reason of the absence or physical or mental incapacity of his parent is without parental care and guardianship;

2a. Who is at risk of being abused or neglected by a parent or custodian who has been adjudicated as having abused or neglected another child in the care of the parent or custodian;

3. Whose custody, visitation or support is a subject of controversy or requires determination; however, such jurisdiction shall be concurrent with and not exclusive of courts having equity jurisdiction, as provided in § 16.1-244 hereof;

4. Who is the subject of an entrustment agreement entered into pursuant to § 63.1-56 or § 63.1-204 or whose parent or parents for good cause desire to be relieved of his care and custody;

5. Where the termination of residual parental rights and responsibilities is sought. In such cases jurisdiction shall be concurrent with and not exclusive of courts having equity jurisdiction, as provided in § 16.1-244 hereof;

6. Who is charged with a traffic infraction as defined in § 46.1-1 (40).

The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed by any party with a legitimate interest therein. In any decree involving visitation, the juvenile and domestic relations district court may provide in such decree for visitation privileges for grandparents, stepparents or other family members.

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B. The commitment of a mentally ill person or judicial certification of eligibility for admission to a treatment facility of a mentally disordered person. Such commitment and certification, shall be in accordance with the provisions of Chapters 1 (§ 37.1-1 et seq.) and 2 (§ 37.1-60 et seq.) of Title 37.1 of the Code. Jurisdiction of the commitment and certification of adults shall be concurrent with the general district court.

C. Except as provided in subsection D hereof, judicial consent to such activities as may require parental consent may be given for a child, who has been separated from his or her parents, guardian, legal custodian or other person standing in loco parentis and is in the custody of the court when such consent is required by law.

D. Judicial consent for emergency surgical or medical treatment for a child, who is neither married nor has ever been married, where the consent of his or her parent, guardian, legal custodian or other person standing in loco parentis is unobtainable because such parent, guardian, legal custodian or other person standing in loco parentis is not a resident of the Commonwealth, or his or her whereabouts is unknown and he or she cannot be consulted with promptness, reasonable under the circumstances, or refuses to give such consent or provide such treatment as is required by the rules to do so.

D1. [Repealed.]

E. Any person who has failed, deserted, neglected or refused to provide support for any person as required by law.

F. Any parent, guardian, legal custodian or other person standing in loco parentis of a child

1. Who has been abused or neglected;

2. Who is the subject of an entrustment agreement entered into pursuant to § 63.1-56 or § 63.1-204 or is otherwise before the court pursuant to subsection A 4 of this section;

3. Who has been adjudicated in need of services or delinquent, if the court finds that such person has by overt act or omission induced, caused, encouraged or contributed to the conduct of the child complained of in the petition.

G. Petitions filed by or on behalf of a child or such child's parent, guardian, legal custodian or other person standing in loco parentis for the purpose of obtaining treatment, rehabilitation or other services which are required by law to be provided for that child or such child's parent, guardian, legal custodian or other person standing in loco parentis. Jurisdiction in such cases shall be concurrent with, and not exclusive of that of courts having equity jurisdiction as provided in § 16.1-241 hereof.

H. In any case where a child is not qualified to obtain a work permit under other provisions of law.

I. The prosecution and punishment of persons charged with ill treatment, abuse, abandonment or neglect of children or with any violation of law which causes or tends to cause a child to come within the purview of this law, or with any other offense against the person of a child. In prosecution for felonies over which the court shall have jurisdiction, such jurisdiction shall be limited to determining whether or not there is probable cause.

J. All offenses committed by one member of the family against another member of the family and the trial of all criminal warrants in which one member of the family is complainant against another member of the family. In prosecution for felonies over which the court shall have jurisdiction, said jurisdiction shall be limited to determining whether or not there is probable cause. The word "family" as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild, regardless of whether such persons reside in the same home.

K. Petitions filed by a natural parent, whose parental rights to a child have been voluntarily relinquished pursuant to a court proceeding, to seek a reversal of the court order terminating such parental rights. No such petition shall be accepted, however, after the child has been placed in the home of adoptive parents; and

L. Any person who seeks spousal support after having separated from his or her spouse.

The ages specified in this law refer to the age of the child at the time of the acts complained of in the petition. (Code 1950, § 16.1-163; 1956, c. 555; 1968, c. 488; 1968, c. [illegible]; 1972, c. [illegible]; 1975, cc. 525, 559; 1978, c. [illegible]; 1979, cc. 475, 488, 491; [illegible].)

§ 16.1-242. Retention of jurisdiction. — When jurisdiction has been obtained by the court in the case of any child, such jurisdiction may be retained by the court until such person becomes twenty-one years of age, except when the person is in the custody of the Department of [illegible] jurisdiction is divested under the provisions of § 16.1-241. (Code 1950, § 16.1-179; 1956, c. 555; 1977, c. 559; 1978, c. [illegible].)

§ 16.1-243. Venue. — A. Proceedings with respect to children under this law shall

1. If delinquency is alleged, be commenced in the city or county where the acts constituting the alleged delinquency occurred or they may, with the written consent of the child and the Commonwealth's attorney for both jurisdictions, be commenced in the city or county where the child resides; and

2. In all other proceedings, be commenced in the city or county where the child resides or in the city or county where the child is present when the proceedings are commenced.

B. If the child resides in a city or county of the State and the proceeding is commenced in a court of another city or county, that court, on its own motion or a motion of a party made at any time prior to final disposition, may, after adjudication, transfer the proceeding to the city or county of the child's residence for such further action or proceedings as the court receiving the transfer may deem proper. Certified copies of all legal and social records pertaining to the case shall accompany the transfer. (Code 1950, § 16.1-160; 1956, c. 555; 1977, c. 559.)

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§ 16.1-244. C[illegible]urrent jurisdiction. — A. Nothing co[illegible]d in this law shall deprive another court of the concurrent jurisdiction to determine the custody of children upon a writ of habeas corpus under the law, or to determine the custody, guardianship, visitation or support of children when such cu[illegible]tody, guardianship, visitation or support is incidental to the determination of causes pending in such courts, provided that when a circuit court shall have taken jurisdiction thereof by entry of an order relating to custody, guardianship, visitation or support the juvenile and domestic relations district courts shall be divested of such jurisdiction. Nothing in this section shall deprive the juvenile and domestic relations district courts of the jurisdiction to temporarily place a child in the custody of any person when that child has been adjudicated abused, neglected, in need of services or delinquent subsequent to the order of any circuit court.

B. Jurisdiction of cases involving violations of federal law by a child shall be concurrent and shall be assumed only if waived by the federal court or the United States attorney. (Code 1950, § 16.1-161; 1956, c. 555; 1977, c. 559; 1978, c. 740.)

§ 16.1-245. Transfer from other courts. — If during the pendency of a criminal or quasi-criminal proceeding against any person in any other court it shall be ascertained for the first time that the person was under the age of eighteen years at the time of committing the alleged offense and jurisdiction over such person and offense lies within the juvenile court, such court shall forthwith transfer the case, together with all papers, documents and evidence connected therewith, to the juvenile court of the city or county having jurisdiction. The court making the transfer shall determine who is to have custody of the child pending action by the juvenile court pursuant to § 16.1-247. (Code 1950, § 16.1-175; 1956, c. 555; 1977, c. 559.)

ARTICLE 4.

Immediate Custody, Arrest, Detention and Shelter Care.

§ 16.1-246. When and how child may be taken into immediate custody. — No child may be taken into immediate custody except:

A. With a detention order issued by the judge, the intake officer or the clerk, when authorized by the judge, of the juvenile and domestic relations district court in accordance with the provisions of this law or with a warrant issued by a magistrate; or

B. When a child is alleged to be in need of services and (i) there is a clear and substantial danger to the child's life or health or (ii) the assumption of custody is necessary to insure the child's appearance before the court; or

C. When, in the presence of the officer who makes the arrest, a child has committed an act designated a crime under the law of this State, or an ordinance of any city, county, town or service district, or under federal law and the officer believes that such is necessary for the protection of the public interest; or

D. When there is probable cause to believe that a child has committed an offense which if committed by an adult would be a felony; or

E. When a law-enforcement officer has probable cause to believe that a person committed to the Department of Corrections as a child has run away or that a child has escaped from a jail or detention home; or

F. When a law-enforcement officer has probable cause to believe a child has run away from a residential, child-caring facility or home in which he had been placed by the court, the local department of public welfare or social services or a licensed child welfare agency; or

G. When a law-enforcement officer has probable cause to believe that a child (i) has run away from home or (ii) is without adult supervision at such hours of the night and under such circumstances that the law-enforcement officer reasonably concludes that there is a clear and substantial danger to the child's welfare; or

H. With a temporary detention order issued in accordance with § 37.1-67.1 by a special justice appointed pursuant to § 37.1-88, who shall receive no fee or by a magistrate. (Code 1950, § 16.1-194; 1956, c. 555; 1958, c. 344; 1974, cc. 583, 671; 1977, c. 559; 1978, cc. 644, 740; 1979, c. 701; 1981, c. 187; 1982, c. 680.)

§ 16.1-247. Duties of person taking child into custody. — A. A person taking a child into custody pursuant to the provisions of § 16.1-246 A during such hours as the court is open, shall, with all practicable speed, and in accordance with the provisions of this law and the orders of court pursuant thereto, bring the child to the judge or intake officer of the court and the judge, intake officer or arresting officer shall, in the most expeditious manner practicable, give notice of the action taken, together with a statement of the reasons for taking the child into custody, orally or in writing to the child's parent, guardian, legal custodian or other person standing in loco parentis.

B. A person taking a child into custody pursuant to the provisions of subsection B, C or D of § 16.1-246, during such hours as the court is open, shall, with all practicable speed, and in accordance with the provisions of this law and the orders of court pursuant thereto:

1. Release the child to such child's parents, guardian, custodian or other suitable person able and willing to provide supervision and care for such child and issue oral counsel and warning as may be appropriate; or

2. Release the child to such child's parents, guardian, legal custodian or other person standing in loco parentis upon their promise to bring the child before the court when requested; or

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3. If not released, bring the child to the judge or intake officer of the court and, in the most expeditious manner practicable, give notice of the action taken, together with a statement of the reasons for taking the child into custody, in writing to the judge or intake officer, and the judge, intake officer or arresting officer shall give notice of the action taken orally or in writing to the child's parent, guardian, legal custodian or other person standing in loco parentis.

C. A person taking a child into custody pursuant to the provisions of subsections E and F of § 16.1-246, during such hours as the court is open, shall, with all practicable speed and in accordance with the provisions of this law and the orders of court pursuant thereto:

1. Release the child to the institution, facility or home from which he ran away or escaped, or

2. If not released, bring the child to the judge or intake officer of the court and, in the most expeditious manner practicable, give notice of the action taken, together with a statement of the reasons for taking the child into custody, in writing to the judge or intake officer, and the judge, intake officer or arresting officer shall give notice of the action taken orally or in writing to the institution, facility or home in which the child had been placed and orally or in writing to the child's parent, guardian, legal custodian or other person standing in loco parentis.

D. A person taking a child into custody pursuant to the provisions of § 16.1-246 A, during such hours as the court is not open, shall with all practicable speed and in accordance with the provisions of this law and the orders of court pursuant thereto:

1. Release the child taken into custody pursuant to a warrant on bail or recognizance pursuant to Chapter 9 of Title 19.2-119 et seq. of Title 19.2, or

2. Place the child in a detention home or in shelter care, or

3. Place the child in a jail subject to the provisions of § 16.1-249.

E. A person taking a child into custody pursuant to the provisions of subsections B, C or D of § 16.1-246 during such hours as the court is not open, shall:

1. Release the child pursuant to the provisions of subsection B1 or B2 hereof; or

2. Release the child on bail or recognizance pursuant to Chapter 9 of Title 19.2; or

3. Place the child taken into custody pursuant to § 16.1-246 B in shelter care after the issuance of a detention order pursuant to § 16.1-255; or

4. Place the child taken into custody pursuant to subsections C or D of § 16.1-246 in shelter care or in a detention home after the issuance of a warrant by a magistrate; or

5. Place the child in a jail subject to the provisions of § 16.1-249 after the issuance of a warrant by a magistrate.

F. A person taking a child into custody pursuant to the provisions of § 16.1-246 E, during such hours as the court is not open, shall:

1. Release the child to the institution or facility from which he ran away or escaped; or

2. Detain the child in a detention home or in a jail subject to the provisions of § 16.1-249 after the issuance of a warrant by a magistrate.

G. A person taking a child into custody pursuant to the provisions of § 16.1-246 F, during such hours as the court is not open, shall:

1. Release the child to the facility or home from which he ran away; or

2. Detain the child in shelter care after the issuance of a detention order pursuant to § 16.1-255 or after the issuance of a warrant by a magistrate.

H. If a parent, guardian or other custodian fails, when requested, to bring the child before the court as provided in subsections B2 and E2 hereof, the court may issue a detention order directing that the child be taken into custody and be brought before the court.

I. A law-enforcement officer taking a child into custody pursuant to the provisions of § 16.1-246 G shall notify the intake officer of the juvenile court of the action taken. The intake officer shall determine if the child's conduct or situation is within the jurisdiction of the court and if a petition should be filed on behalf of the child. If the intake officer determines that a petition should not be filed, the law-enforcement officer shall as soon as practicable:

1. Return the child to his home.

2. Release the child to such child's parents, guardian, legal custodian or other person standing in loco parentis.

3. Place the child in shelter care for a period not longer than twenty-four hours after the issuance of a detention order pursuant to § 16.1-255; or

4. Release the child.

During the period of detention authorized by this subsection, no child shall be confined in any detention home, jail or other facility for the detention of adults. (Code 1950, § 16.1-197; 1956, c. 550; 1958, c. 344; 1973, c. 440; 1974, c. 584; 1975, c. 248; 1977, c. 559; 1978, c. 643; 1979, c. 701.)

§ 16.1-248. Criteria for detention or shelter care. A. A child taken into custody whose case is considered by a judge, intake officer or magistrate pursuant to § 16.1-247 shall immediately be released upon the ascertainment of the necessary facts, to the care, custody and control of such child's parent, guardian, custodian or other suitable person able and willing to provide supervision and care for such child, either on bail or recognizance pursuant to Chapter 9 of § 19.2-119 et seq. of Title 19.2 or under such conditions as may be imposed or otherwise. Provided, however, a child may be detained pursuant to a detention order or warrant in situations where:

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1. The child has a parent, guardian, custodian or other suitable person able and willing to provide supervision and care for such child; or

2. The release of the child would constitute an unreasonable danger to the person or property of others where the child is alleged to be delinquent; or

3. The release of such child would present a clear and substantial threat of serious harm to such child's life or health.

B. The criteria for continuing the child in detention or shelter care as set forth in subsection A of this section, shall govern the decisions of all persons involved in determining whether the continued detention or shelter care is warranted pending court disposition, and such criteria shall be supported by clear and convincing evidence in support of the decision not to release the child. (1977, c. 559; 1979, c. 701.)

§ 16.1-249. Places of confinement for children. — A. If it is ordered that a child remain in detention or shelter care pursuant to § 16.1-248, such child may be detained, pending a court hearing, in the following places:

1. An approved foster home or a home otherwise authorized by law to provide such care;

2. A facility operated by a licensed child welfare agency;

3. If a child is alleged to be delinquent, in a detention home or group home approved by the Department, provided further, a child who is alleged to be in need of services may be detained in a detention home for good cause, for a period not to exceed seventy-two hours prior to a detention hearing being held pursuant to § 16.1-250;

4. Any other suitable place designated by the court and approved by the Department.

B. A delinquent child or a child alleged to be delinquent who is fifteen years of age or older may be detained in a jail or other facility for the detention of adults provided (i) the detention is in a room or ward entirely separate and removed from adults, (ii) adequate supervision is provided and (iii) the facility is approved by the Department for the detention of children and only if:

1. Space in a facility designated in subsection A hereof is unavailable, provided, however, if the child has previously been before the juvenile court and has by waiver or transfer been tried as an adult in the circuit court, this provision shall not apply; or

2. A judge or intake officer determines that the facilities enumerated in subsection A hereof are not suitable for the reasonable protection of the child or community when the child is charged with an offense which would be a Class 1, 2 or 3 felony if committed by an adult; or

3. The detention home in which the child should be placed is at least twenty-five miles from the place where the child is taken into custody and is located in another city or county; provided, however, a child may be placed in such jail or other facility for the detention of adults pursuant to this subparagraph for no longer than seventy-two hours.

C. The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately when a child who is or appears to be under the age of eighteen years, is received at the facility, and shall deliver him to the court upon request, or transfer him to a detention facility designated by the court.

D. When a case is transferred to the circuit court in accordance with the provisions of § 16.1-269 or § 16.1-270, the child if in confinement shall be transferred to a jail or other facility for the detention of adults subject to the limitations of clauses (ii) and (iii) of subsection B hereof.

E. If, in the judgment of the custodian of the child designated in subsection A hereof, a child fifteen years of age or older has demonstrated that he or she is a threat to the security or safety of the other children detained or the staff of the home or facility, the judge shall determine whether such child should be transferred to another juvenile facility, including a jail or other place of detention for adults pursuant to subsection B hereof, after a hearing before the court. (1977, c. 559; 1979, c. 653.)

§ 16.1-250. Procedure for detention hearing. — A. When a child has been taken into immediate custody and not released as provided in § 16.1-247 or § 16.1-248, such child shall be brought before a judge on the next day on which the court sits within the county or city wherein the charge against the child is pending; provided, that if the next day the court does not sit within the county or city on the following day such child shall be brought before a judge within a reasonable time, not to exceed seventy-two hours, after he or she has been taken into custody.

B. Notice of the detention hearing, either oral or written, stating the time, place and purpose of the hearing shall be given to the parent, guardian, legal custodian, or other person standing in loco parentis if he can be found and to the child if twelve years of age or over.

C. During the detention hearing, the judge shall advise the parties of the right to counsel pursuant to § 16.1-266. The parties shall be informed of the child's right to remain silent with respect to any allegation of delinquency. They shall also be informed of the contents of the petition.

D. When the judge finds that the full time detention of a child who is alleged to be delinquent is not required, the court shall order his release and in so doing, may impose one or more of the following conditions singly or in combination:

1. Place the child in the custody of a parent, guardian, legal custodian or other person standing in loco parentis under their supervision or under the supervision of an organization or individual agreeing to supervise him, or

2. Place restrictions on the child's travel, association or place of abode during the period of his release; or

3. Impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children specified in § 16.1-248, or

4. Release the child on bail or recognizance in accordance with the provisions of Chapter 9 (§ 19.2-119 et. seq.) of Title 19.2.

When the judge finds that a child who is alleged to be in need of services has been detained in a detention home prior to the detention hearing, the judge shall order his release from the detention home. The child shall not be returned to a detention home after the detention hearing; provided, however, the judge may impose singly or in combination conditions 1, 2 or 3 listed in this paragraph D.

E. An order releasing a child on any of the conditions specified in this section may, at any time, be amended to impose additional or different conditions of release or to return the child who is alleged to be delinquent to custody for failure to conform to the conditions previously imposed.

F. All relevant and material evidence helpful in determining the need for detention may be received by the court and shall be considered in a hearing on the petition.

G. If the child is not released and a parent, guardian, legal custodian, other person standing in loco parentis or counsel for the child does not appear or does not waive appearance at the hearing, upon the request of such person, the court shall rehear the matter no later than the next day on which the court sits within the county or city wherein the charge is pending; provided that in the event the court does not sit within [illegible] day, such hearing shall be held [illegible] exceed seventy-two hours after the [illegible]. (1977, c. 626.)

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§ 16.1-251. Emergency removal order. [illegible] immediate custody [illegible] removal order [illegible] by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his or her parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition, and

2. There are no alternatives less drastic than removal of the child from his or her home which could reasonably protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to § 16.1-253.

B. Whenever a child is taken into immediate custody pursuant to an emergency removal order, a hearing shall be held in accordance with § 16.1-252 as soon as practicable, but in no event later than five days after the removal of the child. (1977, c. 559.)

§ 16.1-252. Preliminary removal order; hearing. A. A preliminary removal order in cases of abuse and neglect may be issued by the court after a hearing, which shall be in the nature of a preliminary hearing rather than a final determination of custody.

B. Prior to the removal hearing, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian or other person standing in loco parentis of the child and to the child if he or she is twelve years of age or older. If notice to the parents, guardian, legal custodian or other person standing in loco parentis cannot be given despite diligent efforts to do so, the hearing shall be held nonetheless, and the parents, guardian, legal custodian or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the emergency removal order. The notice provided herein shall include [illegible] and [illegible] for the hearing and [illegible] specific statement of the factual circumstances which allegedly necessitate removal of the child.

C. All parties to the hearing shall be informed of their right to counsel pursuant to § 16.1-266.

D. At the removal hearing the child and his or her parent, guardian, legal custodian or other person standing in loco parentis shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

E. In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his or her parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition, and

2. There are no alternatives less drastic than removal of the child from his or her home which could reasonably and adequately protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a preliminary protective order pursuant to § 16.1-253.

F. If the court determines that pursuant to paragraph E hereof the removal of the child is proper, the court shall

1. Order that the child be placed in the care and custody of a suitable person, persons or agency, including a placement in the care and custody of a relative or personal friend; and

2. Order that reasonable visitation be allowed between the child and his or her parents, guardian, legal custodian or other person standing in loco parentis, if such visitation would not endanger the child's life or health. (1977, c. 559.)

§ 16.1-253. Preliminary protective order. — A. Upon the motion of any person or upon the court's own motion, the court may issue a preliminary protective order, after a hearing, if necessary to protect a child's life, health or normal development pending the final determination of a petition filed under this law. Such order may require a child's parents, guardian, legal custodian or other person standing in loco parentis to observe reasonable conditions of behavior for a specified length of time, including, but not limited to the following:

1. To abstain from offensive conduct against the child or against the other parent or against any person to whom custody of the child is awarded;

2. To cooperate in the provision of reasonable services or programs designed to protect the child's life, health or normal development;

3. To allow persons named by the court to come into the child's home at reasonable times designated by the court to visit the child or inspect the fitness of the home and to determine the physical or emotional health of the child;

4. To allow visitation with the child by persons entitled thereto, as determined by the court; or

5. To refrain from acts of commission or omission which tend to endanger the child's life, health or normal development.

B. A preliminary protective order may be issued ex parte upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that the child would be subjected to an imminent threat to life or health to the extent that delay for the provision of an adversary hearing would be likely to result in serious or irremediable injury to the child's life or health, provided, however, that following the issuance of an ex parte order the court shall provide an adversary hearing to the affected parties within the shortest practicable time not to exceed five days after the issuance of the order.

C. Prior to the hearing required by this section, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian or other person standing in loco parentis of the child and to the child if he or she be twelve years of age or older. The notice provided herein shall include (i) the time, date and place for the hearing and (ii) a specific statement of the factual circumstances which allegedly necessitate the issuance of a preliminary protective order.

D. All parties to the hearing shall be informed of their right to counsel pursuant to § 16.1-266.

E. At the hearing the child and his or her parents, guardian, legal custodian or other person standing in loco parentis shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

F. Nothing in this section enables the court to remove a child from the custody of his or her parents, guardian, legal custodian or other person standing in loco parentis, and no order hereunder shall be entered against a person over whom the court is not given jurisdiction as provided in subsection F of § 16.1-241. (1977, c. 559.)

§ 16.1-254. Responsibility for and limitation on transportation of children. — The chief judge of the juvenile and domestic relations district court shall designate the appropriate agencies in each county, city and town, other than the Department of State Police, to be responsible for the transportation of children pursuant to §§ 16.1-250, 16.1-251, 16.1-252 and 16.1-253, and as otherwise ordered by the judge, in no case shall a child known or believed to be under the age of fifteen years be transported or conveyed in a police patrol wagon.

No child shall be transported with adults suspected of or charged with criminal acts. (Code 1950, § 16.1-196; 1956, c. 555; 1958, c. 344; 1971, Ex. Sess., c. 109; 1973, c. 440; 1974, c. 358; 1977, c. 559; 1979, c. 262.)

§ 16.1-255. Limitation on issuance of detention orders for children. — No detention order shall be issued for any child except when authorized by the judge, intake officer or clerk of a juvenile court. (1977, c. 559.)

§ 16.1-256. Limitations as to issuance of warrants for children. — No warrant of arrest shall be issued for any child by a magistrate, except as follows:

1. As provided in § 16.1-260 on appeal from a decision of an intake officer; or

2. As authorized by the judge, intake officer or clerk of a juvenile and domestic relations district court or a judge or clerk of a circuit court for a child known or alleged to be under the age of fifteen years; or

3. For a child alleged or alleged to be between the ages of fifteen and eighteen years, upon a finding of probable cause to believe that the child is in need of services or is a delinquent, when the court is not open, the judge, intake officer and clerk of the juvenile and domestic relations district court are not reasonably available and the criteria for detention or shelter care set forth in § 16.1-248 have been satisfied. For purposes of this section, the phrase "not reasonably available" shall mean that the judge, intake officer or clerk of the juvenile and domestic relations district court could not be reached after the appearance by the juvenile before a magistrate or could not arrive within one hour after he was contacted.

Warrants issued pursuant to this section shall be delivered forthwith to the juvenile court. (Code 1950, § 16.1-195; 1956, c. 555; 1958, c. 344; 1973, c. 440; 1977, c. 559; 1979, c. 701; 1980, c. 214; 1981, c. 184.)

§ 16.1-257. Interference with or obstruction of officer; concealment or removal of child. — No person shall interfere with or obstruct any officer, juvenile probation officer or other officer or employee of the court in the discharge of his duties under this law, nor remove or conceal or cause to be removed or concealed any child in order that he or she may not be brought before the court, nor interfere with or remove or attempt to remove any child who is in the custody of the court or of an officer or who has been lawfully committed under this law. Any person wilfully violating any provision of this section is guilty of a Class 1 misdemeanor. (Code 1950, § 16.1-191; 1956, c. 555; 1977, c. 559.)

§ 16.1-258. Bonds and forfeitures thereof. — All bonds and other undertakings taken and approved by any judicial officer as defined in § 19.2-119, either for the appearance of any person or for the performance of any other duty or undertaking set forth in the bond, shall be valid and enforceable even if the principal in the bond shall be a person under eighteen years of age. In the event of a failure upon the part of the principal or sureties in any bond taken in such court to faithfully carry out and discharge the undertakings of such bond, then, in that event, the judge shall have the right to declare the bond forfeited and to certify the same to the Commonwealth's attorney of the city or county who shall proceed therein in the manner provided by law. The complainant in nonsupport cases shall not be required to furnish an indemnifying bond. (Code 1950, § 16.1-189; 1956, c. 555; 1973, c. 440; 1977, c. 559.)

ARTICLE 8

Adjudication

§ 16.1-273. Court may require investigation of social history. — When the juvenile court or the circuit court as the case may be has adjudicated any case involving a child subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law or a violation of the ordinance of any city regulating surfing, or the violation of any ordinance establishing curfew violations, the court may before final disposition thereof require an investigation, which may include the physical, mental and social conditions and personality of the child and the facts and circumstances surrounding the violation of law. (Code 1950, § 16.1-164; 1956, c. 555; 1972, cc. 672, 835; 1973, c. 440; 1977, cc. 559, 617.)

§ 16.1-274. Time for filing of reports; copies furnished to attorneys; amended reports. — Whenever any court directs an investigation pursuant to § 16.1-273 [A.] § 16.1-273, the probation officer or other agency conducting such investigation shall file such report with the clerk of the court directing the investigation. The clerk shall furnish a copy of such report to all attorneys representing parties in the matter before the court no later than seventy-two hours prior to the time set by the court for hearing the matter. If such probation officer or other agency discovers additional information or a change in circumstance after the filing of the report, an amended report shall be filed forthwith and a copy sent to each person who received a copy of the original report. Whenever such report is not filed or such amended report is filed, the court shall grant such relief as the ends of justice may require. All attorneys receiving such reports are ordered to promptly return such to the clerk upon the conclusion of the hearing and shall not make copies of such report or amended report or any portion thereof. (Code 1950, § 16.1-208.1; 1972, c. 111; 1975, c. 286; 1977, c. 559.)

§ 16.1-275. Physical and mental examinations and treatment; nursing and medical care. — The juvenile court or the circuit court may cause any child within its jurisdiction under the provisions of this law to be physically examined and treated by a physician to be examined and treated at a local mental health center, if no such appropriate facility is available locally, the court may order the child to be examined and treated by any physician or psychiatrist or examined by a clinical psychologist. The Commissioner of Mental Health and Mental Retardation shall provide for distribution a list of appropriate mental health centers available throughout the Commonwealth. Upon the written recommendation of the physician or psychiatrist the court shall have the power to send any such child to a state mental hospital for not more than thirty days for the purpose of obtaining a recommendation for the treatment of the child. No child sent to a state mental hospital pursuant to this provision, however, shall be held or cared for in any maximum security unit

where adults determined to be criminally insane reside, but such child shall be kept separate and apart from such adults.

Whenever the parent or other person responsible for the care and support of a child is determined by the court to be financially unable to pay the costs of such examination as ordered by the juvenile court or the circuit court, such costs may be paid by the county or city according to standards and procedures adopted by the State Board from funds distributed pursuant to § 16.1-322.2.

The juvenile court or the circuit court in a case involving a child within its jurisdiction who is alleged to be delinquent or in need of services to be placed in the temporary custody of the Department of Corrections for a period of time not to exceed thirty days for diagnostic and clinical services after the adjudicatory hearing and prior to final disposition of his or her case. Prior to such a placement, the Department shall determine that the personnel, services and space are available at the appropriate correctional facilities for the care, supervision and study of such child and shall designate the appropriate facility for referral for diagnostic services.

Whenever a child concerning whom a petition has been filed appears to be in need of nursing, medical or surgical care, the juvenile court or the circuit court may order the parent or other person responsible for the care and support of the child to provide such care or to hospitalize or otherwise pay the expenses thereof. If the parent or other person responsible fails to provide such care, the juvenile court or the circuit court may refer the matter to the authority designated in accordance with law for the determination of eligibility for such services in the county or city in which such child or his parents have residence or legal settlement.

In any such case, if a parent who is able to do so fails or refuses to comply with the order, the juvenile court or the circuit court may proceed against him as for contempt or may proceed against him for nonsupport. (Code 1950, § 16.1-190; 1956, c. 555; 1972, c. 354; 1975, c. 430; 1976, c. 321; 1977, c. 559; 1978, c. 739; 1982, c. 486.)

§ 16.1-276. Fees and travel expenses of witnesses. The judge may authorize the payment of the fees and mileage provided by law in § 19.2-278 of any witness or person summoned or otherwise required to appear at the hearing of any case coming within the jurisdiction of the court, which sum shall be paid by the State Treasurer out of funds appropriated in the general appropriations act to the Supreme Court of Virginia. (Code 1950, § 16.1-171; 1956, c. 555; 1977, c. 559; 1982, c. 486.)

§ 16.1-277. Standards for entrustment. Where a parent or other custodian seeks to be relieved of the care and custody of any child pursuant to subsection A 4 of § 16.1-241, or where a public or private agency seeks to gain approval of an entrustment agreement pursuant to § 63.1-56 or § 63.1-204, the court shall grant the requested relief unless it finds that suitable alternative placements exist for such child and the child's interest in such alternative placement and in a transfer of legal custody and placement outside the child's present home would not determinatively affect the child's life, health, or development. (1977, c. 559.)

§ 16.1-278. Cooperation of certain agencies, officials, institutions and associations. A. The judge may order, after notice and opportunity to be heard, any state, county or municipal officer or employee of any governmental agency or other governmental institution to render such information, assistance, services and cooperation as may be provided by the statutory or federal law or an ordinance of any city, county or town.

The officer, agency or institution may appeal such order to the circuit court in accordance with § 16.1-296. The circuit court shall advance such appeals on its docket and may stay the order of the juvenile court during the pendency of the appeal. The circuit court may affirm or reverse the order of the juvenile court. Upon reversal, the circuit court may remand the case to the juvenile court for an alternative disposition.

B. The court is authorized to cooperate with and make use of the services of all public or private societies or organizations which seek to protect or aid children or families, in order that the court may be assisted in giving the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare. (Code 1950, § 16.1-178; 1956, c. 555; 1977, c. 559; 1980, c. 245.)

§ 16.1-279. Disposition. A. If a child is found to be in need of services, the juvenile court or the circuit court, as the case may be, may make any of the following orders of disposition to protect the welfare of the child:

1. Enter an order pursuant to the provisions of § 16.1-278.

2. Permit the child to remain with his or her parent, guardian, legal custodian or other person standing in loco parentis subject to such conditions and limitations as the court may order with respect to such child, and his or her parent, guardian, legal custodian or other person standing in loco parentis.

3. After a finding that there is no less drastic alternative, transfer legal custody subject to the provisions of § 16.1-281 to any of the following:

a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the child.

b. A child welfare agency, private organization or facility which is licensed or otherwise authorized by law to receive and provide care for such child, provided, however, no court shall transfer legal custody of an abused or neglected child to any agency, organization or facility out of the Commonwealth without the approval of the Commissioner of Public Welfare.

c. The local board of public welfare or social services of the county or city in which the court has jurisdiction or, at the discretion of the court, the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction which board shall accept such child for care and custody; provided, however, that such local board of one other than in the county or city in which the court has jurisdiction shall not be required to accept such child until it has been given reasonable notice of the pendency of the case and an opportunity to be heard. Nothing herein shall be construed as prohibiting the commitment of a child to any local board of public welfare or social services in the Commonwealth which such local board consents to the commitment. The board to which the child is committed shall have the final authority to determine the appropriate placement for the child.

4. Transfer legal custody pursuant to subsection A hereof and order the parent, guardian, legal custodian or other person standing in loco parentis to participate in such services and programs for the benefit of such child as the court may prescribe.

5. Terminate the rights of such parent, guardian, legal custodian or other person standing in loco parentis pursuant to § 16.1-278.

B. Where a parent or other custodian seeks to be relieved the care and custody of any child pursuant to subsection A of § 63.1-56 or a public or private agency seeks to gain approval of a permanent entrustment agreement pursuant to § 63.1-204, the juvenile court or the circuit court may, after compliance with § 16.1-277, make any of the orders of disposition permitted in a case involving an abused or neglected child. If the parent or other custodian seeks to be relieved permanently of the care and custody of any child or where a public or private agency seeks to gain approval of a permanent entrustment agreement entered into pursuant to § 63.1-56 or § 63.1-204, the juvenile court or the circuit court may, after compliance with § 16.1-277, terminate the parental rights of the parent or other custodian and place the child in the custody of a local board of public welfare or social services or a licensed child placing agency as custodian of the child with the authority to place the child for adoption and consent thereto; provided, however, that no order of disposition pursuant to this paragraph B shall be made over the objection of any party which was not provided for or requested in the entrustment agreement or in the petition's prayer for relief.

C. If a child is found to be in need of services, the juvenile court or the circuit court, as the case may be, may make any of the following orders of disposition for the supervision, care and rehabilitation of the child:

1. Enter an order pursuant to the provisions of § 16.1-278.

2. Permit the child to remain with his or her parent, guardian, legal custodian or other person standing in loco parentis subject to such condition and limitations as the court may order with respect to the child and his or her parent, guardian, legal custodian or other person standing in loco parentis.

2a. Order the parent, guardian, legal custodian or other person standing in loco parentis of a child living with such person to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the child and parent, guardian, legal custodian or other person standing in loco parentis of such child.

3. Place the child on probation under such conditions and limitations as the court may prescribe.

4. In the case of any child fourteen years of age or older where the court finds that the school officials have made a diligent effort to meet the child's educational needs and after study the court further finds that the child is not able to benefit appreciably from further schooling, the court may

a. Excuse the child from further compliance with any legal requirement of compulsory school attendance; and

b. Authorize the child, notwithstanding the provisions of any other law, to be employed in any occupation which is not legally declared hazardous for children under the age of eighteen.

5. Transfer legal custody to any of the following:

a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the child.

b. A child welfare agency, private organization or facility which is licensed or otherwise is authorized by law to receive and provide care for such child; provided, however, no court shall transfer legal custody of a child in need of services to an agency, organization or facility out of the Commonwealth without the approval of the Commissioner of Public Welfare.

c. The local board of public welfare or social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction, which board shall accept such child for care and custody; provided, however, that such local board of one other than in the county or city in which the court has jurisdiction shall not be required to accept such child until it has been given reasonable notice of the pendency of the case and an opportunity to be heard. Nothing herein shall be construed as prohibiting the commitment of a child to any local board of public welfare or social services in the Commonwealth which such local board consents to the commitment. The board to which the child is committed shall have the final authority to determine the appropriate placement for the child.

6. Require the child to participate in a public service project under such conditions as the court prescribes.

D. Unless a child found to be abused, neglected or in need of services shall also be found to be delinquent and shall be older than ten years of age, he shall not be committed to the State Board of Corrections. No juvenile court or circuit court shall order the commitment of any child jointly to the State Board of Corrections and to a local board of public welfare or social services or transfer the custody of a child jointly to a court service unit of a juvenile court and to a local board of public welfare or social services pursuant to this section.

E. If a child [redacted] to be delinquent, the juvenile court [redacted] circuit court may make any of the following orders of disposition for his supervision, care and rehabilitation:

1. Enter an order pursuant to the provisions of § 16.1-278.

2. Permit the child to remain with his or her parent, guardian, legal custodian or other person standing in loco parentis subject to such conditions and limitations as the court may order with respect to such child and his or her parent, guardian, legal custodian or other person standing in loco parentis.

3. Order the parent, guardian, legal custodian or other person standing in loco parentis of a child living with such person to participate in such programs, cooperate in such treatment or be subject to such conditions and limitations as the court may order and as are designed for the rehabilitation of the child and parent, guardian, legal custodian or other person standing in loco parentis of such child.

3a. Defer disposition for a period of time not to exceed twelve months, after which time the charge may be dismissed by the judge if the child be of good behavior during the period which disposition is deferred.

3b. Without entering a judgment of guilty and with the consent of the child and his attorney, defer disposition of the delinquency charge for a period not to exceed twelve months and place the child on probation under such conditions and limitations as the court may prescribe. Upon fulfillment of the terms and conditions, the court shall discharge the child and dismiss the proceedings against him. Discharge and dismissal under the provisions shall be without adjudication of guilt.

4. Place the child on probation under such conditions and limitations as the court may prescribe.

5. Impose a fine not to exceed $500 upon such child.

6. Suspend the motor vehicle and operator's license of such child.

7. Require the child to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which the child was found to be delinquent.

7a. Require the child to participate in a public service project under such conditions as the court prescribes.

8. In case of traffic violations or traffic infractions, impose only those penalties which are authorized to be imposed on adults for such violations or infractions.

9. Transfer legal custody to any of the following:

a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the child.

b. A child welfare agency, private organization or facility which is licensed or otherwise authorized by law to receive and provide care for such child; provided, however, no court shall transfer legal custody of a delinquent child to an agency, organization or facility outside of the Commonwealth without the approval of the Director.

c. The local board of public welfare or social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction, which board shall accept such child for care and custody; provided, however, that such local board if one other than in the county or city in which the court has jurisdiction, shall not be required to accept such child until it has been given reasonable notice of the pendency of the case and an opportunity to be heard. Nothing herein shall be construed as prohibiting the commitment of a child to any local board of public welfare or social services in the Commonwealth when such local board consents to the commitment. The board to which the child is committed shall have the final authority to determine the appropriate placement for the child.

10. Commit the child to the Department of Corrections; provided, however, no child ten years of age and under shall be committed to the Department.

11. Impose the penalty authorized by § 16.1-284.1.

F. In cases involving the custody, visitation or support of a child pursuant to subsection A 3 of § 16.1-241, the court may make any order of disposition to protect the welfare of the child and family as may be made by the circuit court.

F1. In cases involving a child who is charged with a traffic infraction, impose only those penalties which are authorized to be imposed on adults for such infractions.

G. In cases involving a person [redacted] is judicially certified as eligible for admission to a treatment facility for the mentally retarded, disposition shall be in accordance with the provisions of Chapter 11 (§ 37.1-61 et seq.) and Chapter 2 (§ 37.1-63 et seq.) of Title 37.1 of the Code; provided, however, no child shall be committed pursuant to this section or the provisions of Title 37.1 of this Code to a maximum security unit within any state mental hospital where adults determined to be criminally insane reside.

H. In cases involving judicial consent to the matters set out in subdivisions C and D of § 16.1-241, the juvenile court or the circuit court may make any appropriate order to protect the health and welfare of the child.

I. In cases involving charges of desertion, abandonment or failure to provide support by any person in violation of law, disposition shall be made in accordance with Chapter 5 (§ 20-61 et seq.) of Title 20 of the Code. The court may also award attorney's fees on behalf of any party in an appropriate case. Each juvenile and domestic relations district court may enter judgment for money in any amount for arrears of support and maintenance of any person in cases

where (1) the court previously acquired personal jurisdiction over all necessary parties or the proceeding in which such jurisdiction has been obtained has been referred or transferred to the court by a circuit court or another juvenile and domestic relations district court and (2) payment of such money has been previously ordered by the court, a circuit court, or another juvenile and domestic relations district court. Provided, however, that no such judgment shall be entered unless a petition of a party, a probation officer, a superintendent of public welfare, or on the court's own motion, is duly served on the person against whom judgment is sought, in accordance with the applicable provisions of law, relating to notice when proceedings are reopened, which petition shall contain a caption stating forth the name of the court, the title of the action, the names of all parties and the address of the party against whom judgment is sought, and which states the amount of arrearage for which judgment is sought, and the date and time when such judgment will be sought. The judge or clerk of the court shall certify and deliver an abstract of any judgment entered pursuant to this section to the clerk of the circuit court of the same judicial district, and executions upon such judgment may be issued by the clerk of such circuit court. If the amount of the judgment does not exceed $5,000, exclusive of interest and any attorney's fees, an abstract of any such judgment entered pursuant to this section may be delivered to the clerk of the general district court of the same judicial district, and executions upon such judgment may be issued by the clerk of such general district court. Arrearages accumulated prior to July 1, 1976, shall also be subject to the provisions hereof.

J. In cases involving a child who is not able to obtain a work permit under other provisions of law, the juvenile court or the circuit court may grant a special work permit on forms furnished by the Department of Labor and Industry, subject to such restrictions and conditions as it may deem appropriate and as may be set out in Chapter 5 (§ 40.1-78 et seq.) of Title 40.1 of the Code.

K. In cases involving petitions filed by or on behalf of a child or such child's parent, guardian, legal custodian or other person standing in loco parentis for the purpose of obtaining treatment, rehabilitation or other services required by law to be provided for such persons, the juvenile court or the circuit court, as the case may be, may enter an order in accordance with § 16.1-278.

L. In cases involving the violation of any law, regulation or ordinance for the education, protection or care of children or involving offenses committed by one spouse against another, the juvenile court or the circuit court may impose a penalty prescribed by applicable sections of the Code; provided, however, in cases involving offenses committed by one spouse against another, the court may impose conditions and limitations in an effort to effect the reconciliation and rehabilitation of the parties, including, but not limited to, treatment and counseling for either or both spouses and payment by the defendant spouse for crisis shelter care for the complaining spouse.

M. In cases involving a spouse who seeks spousal support after having separated from his or her spouse, the court may enter any appropriate order to protect the welfare of the spouse seeking support. (Code 1950, § 16.1-178; 1956, c. 555; 1960, c. 331; 1962, c. 369; 1964, cc. 232, 308; 1970, c. 438; 1972, c. 75; 1973, c. 440; 1974, cc. 44, 45; 1976, cc. 42, 404; 1977, c. 529; 1978, cc. 739, 740, 756; 1979, cc. 695, 696, 702; 1980, c. 278; 1981, cc. 476, 481, 491, 510; 1982, cc. 612, 613.)

§ 16.1-280. Commitment of mentally ill or mentally retarded children. — When any juvenile court has found a child to be in need of services or delinquent pursuant to the provisions of this law and reasonably believes such child is mentally ill or mentally retarded, such court may commit him or her to an appropriate hospital or training center for observation as to his or her mental condition, whereupon the proceedings shall be in accordance with the provisions of § 37.1-67.1 (or §§ 37.1-67.2 through 37.1-67.4 of the Code, provided, however, no child shall be committed pursuant to this section or §§ 37.1-67.1 through 37.1-67.4 to a maximum security unit within any state hospital where adults determined to be criminally insane reside. (Code 1950, § 16.1-178.2; 1960, c. 103; 1974, cc. 44, 45; 1977, c. 559; 1978, c. 739; 1981, c. 487.)

§ 16.1-281. Foster care plan. — A. In any case where legal custody of a child is hereafter given to a local board of public welfare or social services or a child welfare agency pursuant to § 16.1-279, the department of public welfare or social services or agency shall prepare a foster care plan for such child, as described hereinafter. The representatives of such department or agency shall consult with the child's parents and any other person or persons standing in loco parentis at the time the board or agency obtained custody concerning the matters which should be included in such plan. The department or agency shall file such plan with the juvenile and domestic relations district court within sixty days following the order of disposition unless the court, for good cause shown, allows an extension of time, which shall not exceed an additional sixty days. A foster care plan need not be prepared if the child is returned to his or her prior family or placed in an adoptive home within sixty days following the order of disposition.

B. Such foster care plan in Part A thereof shall describe (i) the programs, care, services and other support which will be offered to such child and his or her parents and other prior custodians, (ii) the participation and conduct which will be sought from the child's parents and other prior custodians, (iii) the visitation and other contacts which will be permitted between the child and his or her parents and other prior custodians, and (iv) the nature of the placement or placements which will be provided for such child. Such plan shall be designed to lead to the return of such child to his or her parents or other prior custodians within the shortest practicable time which shall be specified in the plan; provided, however, if the department or agency determines that it is not reasonably likely that the child can be returned to his or her prior family within a practicable time consistent with the best interests of the child, in Part B of the plan such department or agency shall (i) include a full description of the reasons for this conclusion, (ii) determine the opportunities for placing the child with a relative or in an adoptive home, (iii) design the plan to lead to the child's successful placement with a relative if a subsequent transfer of custody

to the relative is planned, or in an adoptive home within the earliest practicable time, and if neither of such placements is feasible, (iv) explain why permanent foster care or continued foster care is the plan for the child. The department or agency may include with such proposed plan a proper pleading seeking the termination of residual parental rights pursuant to § 16.1-283.

C. A copy of Parts A and B of the foster care plan shall be sent by the court to the attorney for the child, the child's parents or any other person standing in loco parentis at the time the board or agency obtained custody and such other persons as appear to the court to have a proper interest in the plan. A copy of Part A of the foster care plan shall be sent by the court to the foster parents. Any party receiving a copy of the plan may petition the court for a review of the plan. The judge shall review each petition so filed to determine if there is good cause shown for a hearing on the plan. If the judge shall make any revision in any part of the foster care plan, a copy of such changes shall be sent by the court to all persons who received a copy of the original of that part of the plan.

D. The court in which the foster care plan is filed shall be notified immediately if the child is returned to his or her parents or other persons standing in loco parentis at the time the board or agency obtained custody.

E. Nothing in this section shall limit the authority of the juvenile judge or the staff of the juvenile court, upon order of the judge, to review the status of children in the custody of local boards of public welfare or social services on its own motion. The court shall appoint an attorney to act as guardian ad litem to represent the child any time a hearing is held to review the foster care plan filed for the child or to review the child's status in foster care. (1977, c. 559; 1978, cc. 787, 788; 1982, c. 171.)

§ 16.1-282. Foster care review. — A. This section shall apply to all children under the legal custody of a local board of public welfare or social services or a child welfare agency (i) who were the subjects of a foster care plan filed with the court pursuant to § 16.1-281 and (ii) who have not been returned to their prior family or placed in an adoptive home within sixteen months following the initial foster care placement of the child.

B. The board or agency, or an authorized representative thereof, having legal custody of a child or children subject to this section shall file with the court the petition hereinafter described for each such child within sixteen months after the initial foster care placement of the child.

Such petition shall:

1. Be filed in the court in which the foster care plan was filed for such child. Upon the order of such court, however, the petition may be filed in the court of the county or city in which the board or agency having legal custody has its principal office or where the child resides.

2. Include a copy of the foster care plan previously filed for such child.

3. State, if such is reasonably ascertainable, the current address of the child's parents and, if the child was in the custody of a person or persons standing in loco parentis at the time the board or agency obtained legal custody, of such person or persons.

4. Describe the placement or placements provided for such child while in foster care and the services or programs offered to the child and his or her parents and, if applicable, the persons previously standing in loco parentis.

5. Describe the nature and frequency of the contact between the child and his or her parents and, if applicable, the persons previously standing in loco parentis.

6. Set forth in detail the manner in which the foster care plan previously filed with the court was or was not complied with and the extent to which the goals thereof have been met.

7. Set forth the disposition sought and the grounds therefor; provided, however, that if a continuation of foster care is recommended, a foster care plan for such period of continued foster care shall always be included and shall address the role the current foster parents will play in the future planning for the child.

C. Upon receipt of the petition filed by the board or agency, the court shall schedule a hearing within sixty days and shall provide notice of the hearing and a copy of the petition to the following, each of whom shall be a party entitled to participate in the proceeding:

1. The child, if he or she be twelve years of age or older;

2. The attorney-at-law representing the child as guardian ad litem;

3. The child's parents and, if the child was in the custody of a person standing in loco parentis at the time the department obtained custody, such person or persons. No such notification shall be required, however, if the judge shall certify on the record that the identity of the parent or guardian is not reasonably ascertainable. An affidavit of the mother that the identity of the father is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence before the court which would refute such an affidavit;

4. The foster parent or foster parents of such child;

5. The petitioning board or agency; and

6. Such other persons as the court, in its discretion, may direct.

D. At the conclusion of the hearing, the court shall, upon the proof adduced and in accordance with the best interests of the child, enter any appropriate order of disposition consistent with the dispositional alternatives available to the court at the time of the original hearing.

E. The court shall possess continuing jurisdiction over cases reviewed under this section for so long as a child remains in a foster care placement or, when a child is returned to his or her prior family subject to conditions imposed by the court, for so long as such conditions are effective. After the hearing required pursuant to subsection C hereof, the court shall schedule a hearing on the case periodically thereafter or within three days upon the motion of any party entitled to notice in proceedings under this section when the judge determines there is good cause shown for such a hearing. (1977, c. 559; 1978, c. 788; 1982, c. 171.)

§ 16.1-283. Termination of residual parental rights. A. The residual parental rights of a parent or parents may be terminated by the court as hereinafter provided in a separate proceeding if the petition specifically requests such relief. No petition seeking termination of residual parental rights shall be accepted by the court prior to the filing of a foster care plan, pursuant to § 16.1-281, which documents termination of residual parental rights as being in the best interests of the child. The court may terminate the residual parental rights of one parent without affecting the rights of the other parent. Any order terminating residual parental rights shall be accompanied by an order continuing or granting custody to a local board of public welfare or social services, to a licensed child placing agency or the granting of custody or guardianship to a relative or other interested individual. An order continuing or granting custody to a local board of public welfare or social services or to a licensed child-placing agency shall indicate whether that board or agency shall have the authority to place the child for adoption and consent thereto. The summons shall be served upon the parent or parents and the other parties specified in § 16.1-263. Written notice of the hearing shall also be provided to the foster parents of the child if they have had physical custody of the child for more than twelve months informing them that they may appear as witnesses at the hearing to give testimony and, within the discretion of the court, otherwise participate in the proceeding. The summons or notice of hearing shall clearly state the consequences of a termination of residual parental rights. Service shall be made pursuant to § 16.1-264.

B. The residual parental rights of a parent or parents of a child found by the court to be neglected or abused and placed in foster care as a result of (i) court commitment, (ii) an entrustment agreement entered into by the parent or parents or (iii) other voluntary relinquishment by the parent or parents may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:

1. The neglect or abuse suffered by such child presented a serious and substantial threat to his or her life, health or development; and

2. It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his or her parent or parents within a reasonable period of time.

Proof of any of the following shall constitute prima facie evidence of the conditions set forth in subparagraph B 2 hereof:

a. The parent or parents are suffering from a mental or emotional illness or mental deficiency of such severity that there is no reasonable expectation that such parent will be able to undertake responsibility for the care needed by the child in accordance with his or her age and stage of development.

b. The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parental ability has been seriously impaired and the parent, without good cause, has not responded to or followed through with recommended and available treatment which could have improved the capacity for adequate parental functioning; or

c. The parent or parents, without good cause, have not responded to or followed through with appropriate, available and reasonable rehabilitative efforts on the part of social, medical, mental health or other rehabilitative agencies designed to reduce, eliminate or prevent the neglect or abuse of the child.

C. The residual parental rights of a parent or parents of a child placed in foster care as a result of court commitment, an entrustment agreement entered into by the parent or parents or other voluntary relinquishment by the parent or parents may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:

1. The parent or parents have, without good cause, failed to maintain contact with and to provide or substantially plan for the future of the child for a period of twelve months after the child's placement in foster care notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to communicate with the parent or parents and to strengthen the parent-child relationship; or

2. The parent or parents, without good cause, have been unwilling or unable within a reasonable period to remedy substantially the conditions which led to the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.

Proof of any of the following shall constitute prima facie evidence of the conditions set forth in subparagraph C 1 or 2 hereof:

a. The parent or parents have failed, without good cause, to communicate on a continuing or planned basis with the child for a period of twelve months; or

b. The parent or parents, without good cause, have failed or have been unable to make reasonable progress toward the elimination of the conditions which led to the child's foster care placement in accordance with their obligations under and within the time limits or goals set forth in a foster care plan filed with the court or any other plan jointly designed and agreed to by the parent or parents and a social, medical, mental health or other rehabilitative agency.

D. The residual parental rights of a parent or parents of a child found by the court to be neglected or abused upon the ground of abandonment may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:

1. The child was abandoned under such circumstances that the identity of the parent or parents cannot be determined; and

2. The child's parent or parents, guardian or relatives have not come forward to identify such child and claim a relationship to the child within six months following the issuance of an order by the court placing the child in foster care; and

3. Diligent efforts have been made to locate the child's parent or parents without avail.

E. Notwithstanding any other provisions of this section, residual parental rights shall not be terminated if it is established that the child, if he or she is fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination.

§ 16.1-284. When child fifteen years of age or older may be sentenced as adult. — If a child fifteen years of age or older is charged with an offense which if committed by an adult would be a misdemeanor or felony and the court after receipt of a social history compiled pursuant to § 16.1-273 for this case or a prior case which was adjudicated within twelve months from the adjudication in this case finds that (i) such child is not, in the opinion of the court, amenable to treatment or rehabilitation as a juvenile through available facilities, considering such factors as the nature of the present offense or the nature of the child's prior delinquency record, the nature of the past treatment efforts and the nature of the child's response to past treatment efforts and (ii) the interests of the community require that the child be placed under legal restraint or discipline, then the court may, in such cases, impose the penalties which are authorized to be imposed on adults for such violations, not to exceed twelve months in jail for a single offense or multiple offenses and subject to the provisions of § 16.1-249 B (i), (ii) and (iii). Provided, however, no child who is found guilty of an offense which would be a misdemeanor if committed by an adult shall be confined pursuant to this section for a longer period of time than is authorized for an adult in § 18.2-11 of the Code. (Code 1950, § 16.1-177.1; 1956, c. 555; 1973, c. 440; 1977, c. 559; 1978, c. 142; 1980, c. 235.)

§ 16.1-285. Duration of commitments. — All commitments under this law shall be for an indeterminate period having regard to the welfare of the child and interests of the public, but no child committed hereunder shall be held or detained after such child shall have attained the age of twenty-one years; provided, however, any child who is committed under this law as an abused or neglected child or a child in need of services shall have the right upon request to be released from such commitment at the age of eighteen years. (Code 1950, § 16.1-180; 1956, c. 555; 1977, c. 559.)

§ 16.1-286. Cost of maintenance; approval of placement; semiannual review; roster of placed children. — A. When the court determines that the behavior of a child within its jurisdiction is such that it cannot be dealt with in the child's own locality or with the resources of his locality, it may take custody and place the child, pursuant to the provisions of subsections C 5 b or E 9 b of § 16.1-279 in a private or locally operated public facility, or nonresidential program, excluding those facilities operating under the provisions of § 16.1-313, and approved by the State Board. If such placement is made in accordance with policies and procedures established by the State Board and is not outside the political boundaries of the Commonwealth of Virginia, the cost of such placements shall be paid by the Treasurer out of the general appropriation for criminal costs on warrants of the Comptroller issued upon vouchers approved and signed by the Director or his designee. The Board shall establish a per diem allowance to cover the cost of such placements. The cost, however, shall not exceed that amount which would be incurred if the services required by the child were provided in a juvenile facility operated by the Department of Corrections.

B. Pursuant to regulations established by the Board, the Director or his designee shall be responsible for the placement or approval of placement of all children placed pursuant to the provisions of this section in facilities or programs which can provide appropriate care and for the provision of proper supervision by the court or court service unit making the placement. The court shall receive and review at least semiannually recommendations concerning the continued care of each child in such placements.

C. The Director shall cause a current roster to be maintained concerning the whereabouts of all children placed pursuant to this section. (Code 1950, § 16.1-181.1; 1976, c. 761; 1977, c. 559; 1978, c. 810; 1982, c. 486.)

§ 16.1-287. Transfer of information upon commitment; information to be furnished by and to local school boards. — Whenever the court commits a child to the Department of Corrections or to any other institution or agency, it shall transmit with the order of commitment copies of the clinical reports, predisposition study and other information it has pertinent to the care and treatment of the child. The Department shall not be responsible for any such committed child until it has received the court order and the information concerning the child. All local school boards shall be required to furnish the Department promptly with any information from its files which the Department deems to be necessary in the classification, evaluation, placement or treatment of any child committed to the Department. The Department shall likewise be required to furnish local school boards academic, vocational and related achievement information promptly from its files which the local school board may deem necessary when children are returned to the community from the Department's care. The Department and other institutions or agencies shall give to the court such information concerning the child as the court at any time requires. All such information shall be treated as confidential. (Code 1950, § 16.1-181; 1956, c. 555; 1974, cc. 44, 45, 266; 1977, c. 559; 1981, c. 487.)

§ 16.1-288. Protection of religious affiliations. — In placing a child under the guardianship or custody of an individual or of a private agency or institution, the court shall whenever practicable select a person, or an agency or institution governed by persons, of the same religious faith as that of the parents of the child, or in case of a difference in the religious faith of the parents and religious faith of the child, or if the religious faith of the child is not ascertainable, then of the faith of either of the parents or of the child, unless the parent or parents of the child waive such selection. (Code 1950, § 16.1-182; 1956, c. 555; 1977, c. 559.)

§ 16.1-289. Review of order of commitment. The juvenile court or the circuit court, as the case may be, of its own motion, may reopen any case and may modify or revoke its order. The juvenile court or the circuit court shall before modifying or revoking such order grant a hearing, after notice in writing to the complainant, if any, and to the person or agency having custody of the child; provided, however, that this section shall not apply in the case of a child committed to the Department after sixty days from the date of the order of commitment. (Code 1950, § 16.1-183; 1956, c. 553; 1977, c. 559.)

§ 16.1-290. Support of committed child; support from estate of child. — A. Whenever legal custody of a child is vested by the court in someone other than his parents, after due notice to the parents or other persons legally obligated to care for and support the child, and after an investigation and hearing, the court shall order and decree that the parent or other legally obligated person shall pay, in such a manner as the court may direct, a reasonable sum commensurate with the ability to pay, that will cover in whole or in part the support and treatment of the child after the decree is entered. If the parent or other legally obligated person willfully fails or refuses to pay such sum, the court may proceed against him for contempt, or the order may be filed and shall have the effect of a civil judgment.

B. If a child has an estate in the hands of a guardian or trustee, the guardian or trustee may be required to pay for his education and maintenance so long as there may be funds for that purpose. (Code 1950, §§ 16.1-184, 16.1-185; 1956, c. 553; 1972, c. 172; 1977, c. 559.)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF FREDERICKSBURG

IN RE: RUSSELL KNORR, A Child) APPELLANT'S POST-HEARING MEMORANDUM OF LAW

DISCUSSION OF FACTS

Since the respondent could not anticipate that the Welfare Department would attempt to make an issue of the fact that Mr. Jones and Ms. Lowman once had sexual relations, some evidence on that point was not readily available at trial. Evidence is being forwarded to show conclusively that not only has Mr. Jones not had sexual relations with Ms. Lowman for five and one-half years, but he has been incapable of having sexual relations with her or anyone else since October, 1975. Russell was less than two years old when the relationship between Mr. Jones and Ms. Lowman became platonic. It is a testiment to the strength of the bonds of affection between this couple that they have remained together and plan to stay together under these circumstances. The fact of a sexual relationship would be of dubious significance even if it were current. When the events are more than five years in the past, they are not worthy of consideration.

Some facts pertaining to the existence of a "crisis" were apparently not understood by counsel for Welfare. The incident in which Russell jumped or fell from a balcony occurred, not in 1980, but rather in March, 1979, almost two years before Russell was taken by the Welfare Department. (See Deposition of Patricia Aspinwall, p. 2.) That incident was investigated thoroughly at the time and Russell was not taken from the home.

As to the fire incident, no persuasive evidence has been introduced that Russell started the fire. While Raymond Cote, who turned in the complaint, stated that the child had admitted starting the fire, Mr. Jones stated that Russell denied starting the fire. Any alleged admission must be wholly discounted when it is taken into consideration that the person making the "admission" is of limited competence (being less than seven years of age), that the six-year-old is responding to questions by a hostile adult who already believes the child to be guilty, and that the memory of the adult later reporting an "admission" is so dim that he cannot remember the words of the conversation.

It has been suggested that Russell's going with some neighborhood children to fish in a very shallow channel of the Rappahannock river was an element of some alleged crisis in the late summer of 1980. The evidence showed that in fact Mrs. Grimes, who was taking care of Russell at the time, simply mentioned the incident when Ms. Aspinwall talked to her on the telephone. Deposition of Patricia Aspinwall, p. p. 9, 10. Since the evidence lacks detail on the point, one can only imagine what kind of questioning by Ms. Aspinwall yielded the little nugget of negative information upon which Ms. Aspinwall based her petition in this case. At any rate, it was clear from the testimony of Mrs. Grimes and her grandson at trial that the incident was extremely minor. Judge Cox apparently shared this view, as is shown by his refusal to sanction removal on the basis of an emergency removal order.

The alleged crisis in August and September of 1980 is a crisis made or perceived only by the Welfare Department. There can be little doubt that, had Mr. Jones and Ms. Lowman been Russell's natural parents, Russell would not have been taken.

Some discussion of the evidence with respect to the provision of social services is in order at this point.

Appropriately enough, the alleged "crisis" began with a request by Blanche Lowman for services. Deposition of Patricia Aspinwall, p. 9. Also typically, her request was denied by Ms. Aspinwall. The request, the denial, and the general failure by the Welfare Department to provide meaningful services to Mr. Jones and Ms. Lowman bear further discussion.

Blanche Lowman's request for services in the first week of September consisted of a request for a temporary caretaker for Russell because Mr. Jones was still in the hospital recovering from pneumonia and she had to enter the hospital for a skin graft. She has told that Russell would have to be placed in temporary foster care, as was Mr. Jones later when Ms. Aspinwall went in the hospital. This would ostensibly be necessary because the Welfare Department has no way of providing twenty-four-hour child care. Yet at deposition Ms. Aspinwall admitted that if two natural parents were in the hospital simultaneously, Welfare might be able to place their children informally and without court order, though it might be difficult. Deposition of Patricia Aspinwall, p. 27. Since Ms. Lowman was in a position to pay for Russell's care and later did find a caretaker, one must wonder why the Welfare Department employee was so certain that a court-ordered foster care placement was the only alternative. Yet, under the social services manual,

> Joint planning for diverting the child from the juvenile justice system through alternative service planning is a major component of pre-custody assessment to prevent taking the child's custody whenever possible. Social Services Manual, Section 5141.A.1.

On a number of points, the social worker in this case demonstrated remarkable ignorance or misunderstanding of the facts. Ms. Aspinwall had never spoken to Mr. Jones's neighbors about Russell. (Hearing, December 18, 1980, p. 37). Ms. Aspinwall was apparently under the false impression that Russell

had no coloring books, that he was not read to, and that he was not often taken on walks. (Deposition of Patricia Aspinwall, pp. 16, 17, 18.) These misimpressions were amply rebutted at hearing.

One must finally ask, what did the Welfare Department do upon opening this case? Eight hour-long home visits (two of which must be paired with other visits within two or three days) and three telephone calls in nineteen months are not suggestive of an overly helpful attitude. While Ms. Aspinwall apparently told Mr. Jones he should get family counselling, she never discussed this with Ms. Lowman. (Transcript of hearing, December 19, 1980, p. 41.) Virtually all the services Russell has received since March of 1979 have been obtained by Mr. Jones and Ms. Lowman on their own initiative and without the assistance of the Welfare Department. Ms. Aspinwall did provide one actual service: she drove Ms. Lowman and Russell to the Rappahannock Guidance Clinic to keep the appointment that Ms. Lowman had made at the suggestion of the Child Development Center.

Ms. Aspinwall's testimony relates primarily a number of "expressions of concern" to Mr. Jones. However, Ms. Aspinwall never put her concerns in writing, a technique that she said has been effective in attempting to assist other families in improving their parenting skills. (Deposition of Patricia Aspinwall, p. 21.)

Finally, a word needs to be said about Mr. Jones's alleged heart attack and Russell's alleged hyperactivity. Dr. Peter Smith never found Mr. Jones had had a heart attack. The most he said was that at one time Mr. Jones had an EEG irregularity that could have indicated a mild heart attack, but that could also have been produced by stress. As to Russell's alleged problems, it is plain that those problems are not of any tremendous magnitude. His teachers and neighbors and even the professionals find him

essentially normal. It is indeed strange that the Welfare Department persists in describing him as "hyperactive" even though the mental health professionals have noticeably refrained from applying such a label.

ARGUMENT

The primary issue presented by this case is whether the Juvenile and Domestic Relations Court and, on appeal, the Circuit Court, have jurisdiction or authority to award custody of the child Russell Knorr to the Fredericksburg Department of Public Welfare and Social Services where no abuse, neglect, or abandonment has been alleged or shown and in the absence of any prior Court award of custody. Before entering into discussion of the case law relating to this issue, it is necessary to dispense with one allegation by the Fredericksburg Department of Welfare and Social Services that was first broached at the hearing before this Court.

The Department of Public Welfare and Social Services (hereinafter referred to as Welfare or Welfare Department) alleged for the first time at hearing on March 20, 1981, that the child Russell Knorr had been abandoned by his natural parent, Helen Knorr. That allegation cannot serve as the basis for jurisdiction or decision in this matter for the simple reason that the appellant, Everett T. Jones, had no prior notice that the alleged abandonment by the natural mother would be an issue. The petition in this cause stated only that the child's custody was "in need of determination". For this Court to base its decision in any part upon the alleged abandonment by Helen Knorr would deny to Everett Jones the due process of law. It might further deny due process to Mrs. Knorr, and to Russell Harding, the putative father of Russell Knorr. See Stanley v. Illinois, 405 U.S. 645 (1972). This hearing involved 18 witnesses and required several hours. It is obvious that, had Mr. Jones been on notice that abandonment was an issue, other and different witnesses and evidence would have been brought to the hearing to rebut that allegation. The issues

and relevant evidence in abandonment cases are substantially different from the issues and relevant facts in matters of custody determination. If this Court has any notion of considering whether Russell Knorr had been legally abandoned by his natural mother, appellant submits that he is entitled to a new hearing on that issue, and that Helen Knorr herself is entitled to the opportunity to become a party to this preceding. Given proper notice, Mr. Jones is prepared to introduce evidence that would negate the allegation of abandonment by Helen Knorr.

Other than this belated, orally presented, allegation of the natural mother's abandonment as the basis for its petition, Welfare relies on Virginia Code §16.1-241 (A)(3):

> . . . each juvenile and domestic relations district court shall have . . . exclusive original jurisdiction . . . over all cases, matters and proceedings involving:
>
> A. The custody, visitation, support, control or disposition of a child:
>
> . . .
>
> 3. Whose custody, visitation, or support is a subject of controversy or requires determination.

That statute is an improper basis for removal of a child from his "parents ... or other person standing in loco parentis" on a petition filed by a non-parent third party for it falls short of specifying the evidentiary requirements that the law requires as a prerequisite to the "drastic", "removal" remedy. The paramount right of a parent to his child cannot be contravened by simply showing that the child's custody is in need of determination, for as the Supreme Court recently held in construing §16.1-(C)(3):

> As between a parent who..., on the one hand, and, on the other, third persons, ..., the rights of the custodial parent are paramount; the parent has the authority to control the child.... If these rights are to be derogated by a grant of jurisdiction purporting to permit the award of (removal of custody) despite the custodial parent's objection, the ground should be specific, reflecting the legislative intent in unambiguous language.

West v. King, ___ Va. ___, 263 S.E. 2nd 386, 220 VRR 721 (1980). Indeed one need only review the remaining subsections of §16.1-A, together with Sec. 16.1-279, to find the only specific grounds of jurisdiction which are proper basis for removal; i.e.:

> A1. "child...abused, neglected, in need of services or delinquent.
> 2. abandoned,...
> 4. entrustment agreement....
> 5. termination of residual parental right"

In West v. King, the subject child's paternal grandmother sought visitation rights over the objection of the child's natural mother. The Circuit Court had granted the petition for visitation. The Supreme Court stated that the language of Section 16.1-241 (A)(3) was "completely inadequate to confer jurisdiction" for the award of visitation privileges sought in that case. The Court apparently based its opinion upon the time-honored principle that a statute in derogation of the common law must be narrowly construed, in light of the purposes for which they were enacted. Syndor Pump and Well Company v. Taylor, 201 Va. 311, 110 S.E.2d 525 (1959).

The Welfare Department is apparently unaware of a long standing common law principle that a natural parent has the right to transfer custody of a natural child to the person or persons of his choice. Two Virginia cases, Stringfellow v. Somerville, 95 Va. 701, 29 S.E. 685, 40 L.R.A. 623 (898) and Wyatt v. Gleason, 117 Va. 196, 83 S.E. 1059 (1915) illustrate the application of this common law principle in the Commonwealth. Neither Stringfellow nor Wyatt has ever been overruled: they stand as authoritative cases to this day. Not only do the cases support the proposition that parents may transfer custody on their own authority as natural guardians, but they go further, saying that, where a parent has given over a child to another party to raise and bonds of natural affection have grown up, the child will not be given back to a parent unless there is proof that it would plainly promote the child's welfare, moral or physical. See also Fleshood v. Fleshood, 144 Va. 767, 130 S.E. 684 (1925).

If the paternal grandmother of the child in West v. King did not have standing under 16.1-241 (A)(3), how much less does the Department of Welfare have standing? The grandmother was an individual, already well known to the child, with ties of kinship and affection. The Welfare Department is an impersonal bureaucracy. It is clear from the language of 16.1.241 as well as the language of 16.1-279 that the Welfare Department may properly intercede in custody matters under certain particular circumstances, but, even there, the Court has limited powers of disposition. Had the child ever been put in the custody of the

Welfare Department, (whether de facto or by Court order) for example, the courts would have authority to decide who should have custody if another party were to demand custody. Otherwise, the statutory structure precludes officious intermeddling into family matters, such as the rearing of children, in the absence of such overriding considerations as abuse, neglect, abandonment, voluntary relinquishment of custody by the natural parent, or the like.

Lowe v. Grasty, 203 Va. 168, 122 S.E. 2nd 867 (1961) stands for the proposition that the power of the courts to make disposition in matters concerning children are limited by statute. That opinion does use some rather broad language insofar as it states that the courts have inherent powers to decide questions involving custody of infants. The Court in Lowe, however, went on to say that the Welfare Department could not, at the time that case came before the Supreme Court, obtain in order terminating the parental rights of the natural parents where no adoption was in process because the statute at that time granted no such power. The statute, of course has since been amended. The case, nonetheless, makes it clear that the power of the Court is indeed defined and, to a large extent, limited by statute.

There are a number of cases in which the Virginia Supreme Court has made the point that neither the Welfare Department nor the Circuit Court has unbridled discretion to dispose of the custody of a child. The Supreme Court has apparently found it necessary on numerous occasions to remind welfare departments that indeed the natural rights of the parents must be respected regardless of the institutional needs and desires of a department of welfare. Weaver v. Roanoke Department of Human Resources, ___ Va. _____, 265 S.E.2nd 692, 220 VRR 899 (1980), Rocka v. Roanoke County Department of Public Welfare, 215 Va. 515, 211 S.E.2nd 76 (1978) and Lowe v. Grasty, supra.

There is additional statutory language that supports the contention that the Department of Welfare cannot intervene, willy-nilly, into every home about which its employees have "concerns." In Section 16.1-279 (A), the power of the Court to dispose of a case wherein abuse or neglect is alleged is described.

> If a child is found to be abused or neglected, the juvenile court or the circuit court, . . . may make any of the following orders of disposition to protect the welfare of the child:
>
> . . .
>
> 2. Permit the child to remain with his or her parent, guardian, legal custodian or other person standing in loco parentis subject to such conditions and limitations as the court may order with respect to such child, and his or her parent, guardian, legal custodian or other person standing in loco parentis.
>
> 3. After a finding that there is no less drastic alternative, transfer legal custody subject to the provisions of §16.1-281 to any of the following:
>
> a. A relative or other individual who, after study, is found by the court to be qualified to receive and care for the child.
>
> b. A child welfare agency, private organization or facility which is licensed or otherwise authorized by law to receive and provide care for such child . . .
>
> c. The local board of public welfare or social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence . . . .
>
> (Emphasis added.)

The second option under that Section states that the Court may permit the child to remain with his or her "parent, guardian, legal custodian, or other persons standing in loco parentis." The term "in loco parentis" is not defined in the statute. It

is obviously something other than, and different from, a parent, guardian, or legal custodian. Common understanding of the term would indicate that it is anyone standing "in place of the parent." Thus, schools are sometimes said to stand in loco parentis while a child is in attendance. The Virginia case law does not have a great deal about this term, but there is a case (involving different issues) in which the Supreme Court stated that "whether a stepchild bears such a relation to his stepfather as to place the latter in loco parentis is dependent upon the facts of each particular case", and went on to state that the test for that status was based upon the kinds of emotional ties that existed between the parties. Doughty v. Thornton, 151 Va. 785, 145 S.E. 249 (1928). If a stepfather, who had no blood ties with his stepchild, might be a person standing in loco parentis, it seems clear that a foster parent, who has been given custody and guardianship responsibility by the natural parent, must be a person standing in loco parentis, especially where there are such deep and long standing bonds of affection that mental health professionals state unequivocally that the caretaker is the "psychological parent" of the child. Black's Law Dictionary defines in loco parentis as follows:

> "In the place of a parent: instead of a parent; charged, factitiously, with a parent's right, duty and responsibilities."

The fact that the legislature saw fit to refer to "parent, guardian, legal custodian, or other person standing in loco parentis" indicates the intent to go beyond narrow definitions and to take in any person playing an important parental role in the life of the child. If the legislature intended to confer rights upon persons standing in loco parentis even where a child had been abused or neglected, surely they did not mean to eradicate custody rights in the absence of abuse or neglect.

The reading of Section 16.1 that is suggested by Welfare in this case would render Sections 16.1-241 and 16.1-279 meaningless. The Welfare Department would be able to circumvent the elaborate safeguards of the rights of caretakers created by 16.1-279 by simply asserting that the child's custody was in need of determination. Such bootstrapping should not be allowed by any court, and, if allowed, would almost certainly be unconstitutional.

It has long been recognized that there is a constitutionally protected interest in preserving the family unit and raising one's children. Moore v. East Cleveland, 421 U.S. 494 (1976); Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345 U.S. 528 (1953); Myer v. Nebraska, 262 U.S. 390 (1923). The constitutional right of family integrity can only be overridden by a state interest that reaches a significant magnitude. Clearly the state has an overriding interest in protecting infants and children from abuse and neglect. The state has an equally compelling interest in sheltering homeless children, and in supervising delinquent and ungovernable children. The state does not have a sufficiently important interest in moving children from their homes on the basis of some social worker's vague disapproval of child rearing practices or concerns about the health of the parents. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 2 FLR 2140, affirmed, 545 F.2nd 1137, 3 FLR 2151 (S.D. Iowa, 1975).

In the Alsager case, the relevant statute of the State of Iowa was found to be impermissibly vague in that it did not clearly delineate those practices that would give rise to an interference in the home and custody of children by the local welfare department. The Virginia statute, on the other hand, is

a model of clarity. Abuse and neglect are clearly defined. There are many ways in which the statute, if properly construed, makes clear the circumstances under which a parent or caretaker risks losing a child. The circumstances of this case are not among those proscribed.

One glaring fact that emerged from the hearing on this case was that Russell Knorr has never been abused or neglected. On the contrary, he has been well fed, well dressed, well cared for in every respect, and given every opportunity available to him for education, religious teaching, and friendship with other children. Not even Patricia Aspinwall, the child protective worker who authorized filing of the petition in this matter, could state there had been abuse or neglect. She could only state that she had a great many "concerns" and that she believed that the child should be removed.

A great many of the cases on child custody in the Commonwealth of Virginia use the term fitness, stating that a parent found to be unfit would be denied custody. In those cases, however, close analysis shows that fitness was an issue where two parties, both of whom had equally valid legal claim to custody of the child, were in contention over custody. Thus, where two parents have separated, or where a natural parent has previously been divested of custody by court order and another party has been given custody, it has been said that a showing of unfitness would be determinative of the case. See Dyer v. Howell, 212 Va. 453, 184 S.E. 2d 789 (1971); McEntire v. Redfearn, 217 Va. 313, 227 S.E. 2d 741 (1976).

If fitness is an inappropriate standard to be applied in this case, then the best interest of the child is an even less appropriate standard by which to decide custody. Were the departments of welfare of the Commonwealth allowed to intervene in every

home situation whenever it was felt that the best interest of the child could be served by the transfer of custody, who knows how many children of monetarily impoverished parents would be taken from their homes and be placed for adoption in middle class families? "Best interest" is the applicable standard only when all parties before the court are of equal fitness and have an equal legal claim. Here, the Welfare Department has no legal claim. As to fitness, a State agency which can offer only temporary foster care and the possibility of adoption in the remote future is presumptively less fit than long-time caretakers known and loved by a child.

Since there was some discussion of adoption in the course of the hearing on this matter, it is appropriate in this brief to point out that Helen Knorr herself still has parental rights with respect to Russell Knorr. Under Weaver v. Roanoke Department of Human Resources, supra, Mrs. Knorr's rights could hardly be terminated easily. Also, under Stanley v. Illinois, supra, the putative father has the right to appear in any proceedings. While such legal proceedings would drag on, Russell would remain anxiously in foster care, scarcely able to understand his own situation. The appellant has made no concession as to Mrs. Knorr's fitness as mother, and no evidence has been introduced before this Court. Thus, were this Court to uphold the decision of the Juvenile and Domestic Relations Court, Russell's future would become more, not less, problematic, uncertain and unstable.

THE ADOPTION ISSUE

The appellant has taken the position that adoption is not the issue in this case. In deference to the Court's request for information on this topic, however, a few words will be said here.

The parent of a child may place that child for adoption. Code of Virginia, as amended, 1950, Section 63.1-220.1. The Circuit Court has exclusive jurisdiction of such cases and a petition may be brought by any natural person who resides in the Commonwealth. Section 63.1-221. While the petition must ordinarily show parental consent before a judge of the Juvenile and Domestic Relations Court, after opportunity for counselling, the Circuit Court may waive that requirement. Id.

When a petition is filed, the local superintendent of public welfare (or child-placing agency) is required to make a report after investigation. Section 63.1-223 (a) and (b). If the report is not made to the Court within a certain period of time, the Court may proceed to hear and determine the merits of the petition and enter appropriate orders. Section 63.1-223 (c).

Certain elements must be treated in the investigative report. These are:

> (1) Whether the petitioner is financially able, except as provided in chapter 11.1 (§63.1-238.1 et seq.) of this title, morally suitable, and a proper person to care for and to train the child, (2) what the physical and mental condition of the child is, (3) why the parents, if living, desire to be relieved of the responsibility for the custody, care and maintenance of the child, and what their attitude is toward the proposed adoption, (4) whether the parents have abandoned the child or are morally unfit to have custody over him, (5) the circumstances under which the child came to live, and is living, in the same home of the petitioner, (6) whether the child is a suitable child for adoption by the petitioner and (7) what fees

> have been paid by the petitioners or in their behalf to persons or agencies which have assisted them in obtaining the child. Code of Virginia, §63.1-223(d).

The investigative report also includes a recommendation as to the actions to be taken by the Court on the petition. The welfare departments use a manual that gives criteria for approval of adoptions. See Appendix A. It is of interest to this case that the first criteria, (age no more than forty years older than the child,)"can be flexibly applied when considering prospective adoptive parents for children with special needs . . ." Under Code of Virginia, as amended 1950, Section 63.1-238.1(b), Russell Knorr is a child with special needs because of his age:

> (b) "Child with special needs" shall mean any child in the custody of a local board of public welfare or social services which has the authority to place the child for adoption and consent thereto in accordance with the provisions of §63.1-56, for whom it has been determined that it is unlikely that the child will be adopted within a reasonable period of time due to one or more factors including, but not limited to:
>
> 1. Physical, mental or emotional condition existing prior to adoption;
>
> 2. Hereditary tendency, congenital problem or birth injury leading to substantial risk of future disability; or
>
> 3. Individual circumstances of the child related to age, racial or ethnic background or close relationship with one or more siblings. (1974, c. 507; 1978, c. 536.)

As a child with special needs (also defined at greater length in the Social Services Manual, Appendix B of this brief), Russell would qualify for special financial assistance to meet any needs for which his adoptive parents might have inadequate resources. (Code, Section 63.1-238.3; Appendix B of this brief.) Thus, were he to be placed with Mr. Jones, he would be the beneficiary of both an increase in Mr. Jones's Social Security

allotment and the special services available from the Welfare Department, including medical care, educational services, and a host of special services. The other criteria for approval are all met by Mr. Jones.

Once the report is made, the Court may enter an interlocutory order of adoption if it is satisfied that the child will be provided for finacially, that the adoptive parent is a morally suitable and a proper person to care for and train the child, that the child is suitable for adoption by the petitioner, and that the best interests of the child will be promoted by the adoption. Code, Section 63.1-226. Thus, while the Welfare Department must consider a wide range of factors in recommending for or against an adoption, the Circuit Court is not bound by the recommendation, nor must it find that all criteria for approval are met.

After an interlocutory order, the Code provides for visitation and report during a probationary period. Section 63.1-229. There is also provision to allow omission of the probationary period and interlocutory order, if the child has resided in the home of the petitioner continuously for five years. Code, Section 63.1-229(b). For a final order of adoption, the Court need only be satisfied that the adoption would be in the best interest of the child. Code, Section 63.1-230.

Finally, parental consent to the adoption is required unless the Court, after hearing, finds that valid consent is withheld contrary to the best interests of the child. Code, Section 63.1-225(c).

Respectfully,

EVERETT JONES

BY: _____
Of Counsel

Catherine Blackwell Tackney
Counsel for the Respondent

Rappahannock Legal Services, Inc.
910 Princess Anne Street
Fredericksburg, Virginia 22401

CERTIFICATE OF SERVICE

I, Catherine Blackwell Tackney, Counsel for the Respondent, do hereby certify that a true and correct copy of the above memorandum was hand delivered to Ms. Ann Palamar, at 315 William Street, Fredericksburg, Virginia this April 2, 1981.

_____

Catherine Blackwell Tackney

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF
PUBLIC WELFARE AND
SOCIAL SERVICES,
Appellee

PETITION FOR WRIT OF APPEAL

C. Blackwell Tackney
Attorney for Appellant
Rappahannock Legal Services, Inc.
910 Princess Anne Street
Fredericksburg, Virginia 22401
(703) 371-1105

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

EVERETT T. JONES,
. . . Appellant

v.

FREDERICKSBURG DEPARTMENT OF
PUBLIC WELFARE AND SOCIAL SERVICES
. . . Appellee

PETITION FOR WRIT OF APPEAL

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Appellant, Everett T. Jones, respectfully represents unto your Honors that he is aggrieved by the judgment entered by the Circuit Court of the City of Fredericksburg on June 10, 1981.

Appellant here, Everett T. Jones, will be designated as Everett Jones, Bill Jones or Mr. Jones; Appellee, Fredericksburg Department of Public Welfare and Social Services will be designated as either the Department of Welfare or the Welfare Department.

II. NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE LOWER COURT

This is an appeal from the decision of the Circuit Court of the City of Fredericksburg, Virginia granting custody of the seven-year-old boy, Russell Knorr, to the Department of Public Welfare. That decision denied custody and standing to seek custody to Everett Jones,

who had raised Russell Knorr from infancy. The child's natural mother had consented to Everett Jones' adopting the child in December, 1977 and appointed Mr. Jones guardian in July, 1978. Mr. Jones had not adopted the child, nor had he obtained a custody order from any court.

The Department of Welfare removed Russell Knorr from the custody of Everett Jones and his companion, Blanche Lowman, first on September 26, 1980, under an emergency removal order from the Juvenile and Domestic Relations Court of the City of Fredericksburg. That order was entered pursuant to a petition and ex parte hearing alleging that the "child's custody is in need of determination." On September 29, 1980, after a hearing in which both parties were represented, Judge William J. Cox of the Juvenile and Domestic Relations Court ordered the child returned to Mr. Jones and Ms. Lowman. Judge Cox also ordered further investigation and a subsequent hearing. At the later hearing, on November 13, 1980, the Juvenile and Domestic Relations Court again ordered the child removed. Everett Jones filed a timely appeal to the Circuit Court.

On December 18, 1980, the Circuit Court of the City of Fredericksburg heard evidence on a Motion for Preliminary Removal Order filed by Mr. Jones. The

* The motion sought to have the child returned to the home pending final hearing.

Circuit Court ordered that the child, who had been placed in foster care, be allowed to visit in the Jones-Lowman home for one week only, beginning Christmas day and ending January 2, 1981.

After the final hearing, which took place in March, 1981, the Circuit Court, by memorandum opinion, granted the petition of the Welfare Department, holding that:

> ". . .only the best interest of the child can be considered. I cannot agree that Jones and Lowman have the necessary standing to demand custody of or the right to adopt. The child was placed with them by the natural mother and undoubtedly were she a party to this suit and were she to testify, she would favor Jones and Lowman as custodians, if for no other reason than the care and love that they gave Russell in his early years and for the favor of relieving her of that responsibility . . .
>
> . . . I can find no realistic basis for granting permanent custody of this child to Mr. Jones and Ms. Lowman nor to Mr. Jones alone. I am reluctant to have to say it but I must find that Jones and Lowman are not fit and proper persons, within the meaning of the statute, to have custody of the child, for all of the reasons that the record makes quite clear. This finding has nothing to do with their moral character but refers to their economic and health conditions and their inability to fulfill normal parenting responsibilities."

The evidence in this cause was introduced at the two hearings of the Circuit Court, the transcript and exhibits of the first hearing being incorporated by reference into the record of the final hearing. There were twenty-three (23) witnesses and many pieces of documentary evidence.

III. ASSIGNMENTS OF ERROPS

1. The Juvenile and Domestic Relations Court lacked original jurisdiction to hear and grant a custody petition from the Welfare Department alleging only that the child's custody was in need of determination where no abuse, neglect, abandonment, delinquency, or need for supervision was alleged or proven; the Circuit Court lacked appellate or original jurisdiciton under the same circumstances.

2. The Court violated Everett Jones' rights under the due process clause of the Fourteenth Amendment, or his constitutional rights of family privacy, or both, by intruding into the familial relationship originating from the express entrustment of the child to Mr. Jones by Russell's natural mother.

3. The Order of the Circuit Court as to the best interest of the child was not based upon clear and cogent evidence and should be reversed for that reason.

4. The Court applied the incorrect legal standard to the evidence in finding Everett Jones an unfit parent for economic and health reasons."

IV. STATEMENT OF FACTS

1. Undisputed Facts

Russell Knorr first came to Everett Jones and Blanche Lowman when he was seven or eight days old, in January, 1974. Mr. Jones was approximately sixty years of age at the time. He was living with a woman not his wife, Blanche Lowman, who was thirty-one. Russell's mother, Mrs. Helen Knorr, signed sworn documents in 1977 and 1978 naming Everett Jones as the child's legal guardian and giving Mr. Jones leave to adopt the child. The relationship between Mrs. Knorr, Mr. Jones and Ms. Lowman is not explained on the record, but Mrs. Knorr apparently remained in contact with the family; besides signing the guardianship and adoption papers, she was available to give a medical history of the child to Dr. Raymond Jones of the Child Development Center in March, 1979, and she sat as an observer in the final hearing of this cause.

Even less is known of Russell's natural father. The Welfare Department social worker, Patricia Aspinwall, related that one Russell Harding was the alleged father of the child. One witness,

Raymond Cote, described a confrontation with a gentleman who said he was Russell's natural father in the Jones apartment in August or September, 1980. There is no information on record about Mrs. Knorr's husband.

At the time that Mr. Jones and Ms. Lowman began caring for Russell, in January, 1974, they had lived together as an unmarried couple for approximately five years. From 1969 to 1976, they apparently maintained a meretricious relationship. After 1976, the relationship became platonic.

In 1978, Mr. Jones instituted an adoption petition, seeking to make Russell his legal son. Following the statutorily required adoption investigation, the Department of Welfare's report recommended against the adoption. Mr. Jones withdrew the petition, and no further steps were taken at that time.

Russell Knorr remained in the care of Mr. Jones and Ms. Lowman. He began going to church nursery school in 1977, when he was three years old. When it was noticed in 1978 that he had a speech problem, Mr. Jones and Ms. Lowman enrolled him in the summer Head Start program at the age of four. He received speech therapy and was much improved at the end of the summer. He returned to Head Start the next summer. Parents are encouraged to attend sessions along with the Head Start children, and Blanche Lowman did attend.

Suspecting that Russell had a behavior problem, Ms. Lowman and Mr. Jones had Russell evaluated by the Rappahannock Area Child Development Center in early 1979. Russell was examined by Dr. Michael Fray an Dr. Raymond Jones in a series of visits beginning February 15, 1979.

On or about March 1, 1979, Russell jumped off the balcony of the Jones-Lowman apartment while the adults in the kitchen thought he was napping in the living room. The incident was reported to the Welfare Department and an investigation was conducted. No action was taken, but a social worker, Barbara Aguirrezabal, was assigned to monitor the family's care of Russell. Ms. Aguirrezabal made four home visits in the Spring of 1979.

The Child Development Center report on Russell, which Mr. Jones and Ms. Lowman had requested, was completed sometime after April 6, 1979. The relevant section of the report read as follows:

> "From the results of the testing, it appears that Russell is functioning within the Average range of cognitive ability. Some weaknesses were noted primarily in the perceptual-motor area. His fine motor skills were slightly awkward, especially when trying to use a pencil. His elevated level of activity causes auditory

> receptive tasks to be less efficient than tasks which have visual input. Verbal directions are also difficult for him to deal with. From the history and from this testing, it would appear that Russell has several of the signs of the child who has minimal neurological dysfunction. Thus, the possibility exists that he is going to be a child who might experience some learning difficulties within the school setting. In addition to these problems, he appears to be a child who has a very poor impulse control, is distractable and has some aggressive tendencies which come out of his behavior with peers. He probably has an active fantasy life and resorts to it quite often for his own self satisfaction. With the home environment taken into consideration, it is not surprising that some of the emotional difficulties and lack of self control exists. If he is to continue to remain in this home, it would seem that the parents will need a great deal of help in how to handle him and structure his environment, for if this is not done, it will probably be only a matter of time before he is beyond their control and in need of another placement."

In the ensuing months, Mr. Jones and Mr. Lowman carried out Child Development recommendations by providing Russell with his own bed, taking him completely off a baby bottle he had been using, and exploring use of appropriate medication.

The Welfare Department's monitoring of the Jones-Lowman family continued through 1979 and 1980, though there were few home contacts. Russell entered

kindergarten in the fall of 1979. In the summer of 1980, he began to take medication prescribed by Dr. Raymond Jones.

In August of 1980, Everett Jones became quite ill with a respiratory tract infection aggravated by asthma. He was in the Mary Washington Hospital intensive care unit for seventeen (17) days, at times breathing with mechanical assistance. He was extremely weakened by the prolonged bed rest, and was not released for several weeks.

During the time Mr. Jones was in the hospital, Blanche Lowman was disabled by a recurring leg ulcer, requiring that she undergo skin-graft surgery in the hospital on or about September 15, 1980.

While Mr. Jones and Ms. Lowman were in the hospital, until September 26, 1980, Russell was cared for by Mrs. Ethel Grimes, a friend Blanche knew from Head Start. Before entering the hospital, Ms. Lowman had called the social worker, Ms. Aspinwall, for help in finding someone to care for Russell. Ms. Aspinwall urged that Russell be placed in foster care, a suggestion that Ms. Lowman rejected. Ms. Aspinwall also visited with Mr. Jones in the hospital at that time for over an hour and attempted to persuade him to voluntarily relinquish custody of the boy to the Department of Welfare. He also refused.

On September 26, 1980, Department of Welfare social worker Cheryl Matthew removed Russell from the Grimes' home under the emergency removal order previously mentioned. He was returned on September 29, the following Monday, but was removed from the Jones-Lowman home by court order on November 13, 1980.

From November 13, 1980 to the present, Russell Knorr has remained in foster care. For a short time, in November and December, 1980, Russell was allowed to call Mr. Jones and Ms. Lowman weekly, but the telephone calls were discontinued by either the Department of Welfare or the foster parents when Russell appeared upset after the calls. Russell did go home for Christmas week, as previously stated. Subsequent requests for visitation were denied by the Court.

2. Facts in Dispute and Opinion Evidence

There is a conflict in the evidence as to who, if any, of the Blanche Lowman sought appropriate counseling for herself and Russell. Ms. Lowman said she had attended classes for parents taught by Gwendolyn Bowler of the school system. Ms. Aspinwall, the social worker, carried Ms. Lowman and Russell to the Fairchild's Gardens Clinic on one occasion. Blanche said she took Russell to the Clinic twice, but that [illegible] had [illegible]

shouldn't bring him back." It is undisputed that Everett Jones did not receive counseling other than that provided by the Child Development Center in the course of Russell's evaluation in 1979.

Patricia Aspinwall testified that she had spoken with Everett Jones several times about the need for family therapy or parenting classes, urging him to seek counseling. Mr. Jones denied being told by Ms. Aspinwall to obtain counseling. Cheryl Matthew testified that Ms. Lowman and Mr. Jones refused to obtain psychological testing in November or December, 1980. Reports from the Rappahannock Guidance Clinic show that both Blanche Lowman and Bill Jones underwent psychological testing in December, 1980 and January, 1981.

Social worker Cheryl Matthew and psychologist Roger Pastorak indicated that Russell was adjusting to his foster family. Psychologist Michael Bray testified to the contrary, that the child was experiencing a great deal of anxiety because of his separation from Mr. Jones and Ms. Lowman. Dr. Donald Reed, a psychiatrist with the Rappahannock Guidance Clinic, testified to possible future ill effects on a child's personality resulting from a sudden unexplained separation from the primary caretakers.

Viola Ely, a neighbor of Everett Jones and Blanche Lowman, said that Blanche was "a wonderful

parent." Dr. Reed testified that Everett Jones appeared to be mentally capable and psychologically responsible to care for a seven-year-old boy. No direct opinion evidence as to the parenting ability of Mr. Jones and Ms. Lowman was introduced by the Welfare Department, though social worker Patricia Aspinwall stated her opinion that there was psychological neglect. The 1979 evaluation previously quoted suggested that Russell's home life was inadequate in some way, but did not elaborate.

Finally, there was contradictory evidence as to Russell Knorr's behavior. Neighbors and teachers testified that he was a normal child. Some of the experts thought he had problems with aggressiveness and impulse control. It was alleged that Russell had set a fire and that he had been found in the ring unsupervised. The latter evidence and its significance were seriously disputed.

V. ARGUMENT

A. Neither the Juvenile and Domestic Relations Court nor the Circuit Court had jurisdiction to order Russell taken from Everett Jones where the Welfare Department failed to allege or prove abuse, neglect, abandonment, or other grounds to remove the child under Virginia Code Section 16.1-241(A)(3). This Court has already addressed substantially the same issue in West v. King, 2.4 Va. 704, 2e3 S.E.2d 386, 220 USP 721 (1980).

There are at least three significant differences between the instant case, and the West case. This dispute is one between a local Welfare Department office of the Department of Social Services and the child's unrelated caretaker from birth, rather than the child's mother and paternal grandmother: the issue is custody rather than visitation: and, in 1980, Section 16.1-241(A)(3) was modified in a way that calls into question the continued viability of West v. King.

The Welfare Department should be conceded no more a priori right to be heard in Virginia Courts than non-custodial relatives: in either case, jurisdiction must rest entirely on statute. West v. King, supra; Lowe v. County, 203 Va. 168, 122 S.E.2d 867 (1961). In the Lowe case, the Supreme Court ruled that the Welfare Department could not obtain a termination of parental rights where an adoption was in progress.

because the statute, at that time, granted no such power.

Contrast the standing of the Welfare Department which must rest entirely on statute, with the position of Everett Jones.

The uncontradicted evidence in this case was that Helen Starr, Russell's natural mother, had entrusted Russell as an infant to Everett Jones, and that the latter had raised the boy. Older Virginia cases abound in which the Courts have honored such extrastatutory arrangements, usually made shortly before the mother's death. In some cases, this court has given priority to such a mother-appointed guardian even over the claim of the natural parent. Coffee v. Black, 82 Va. 567(1886); Stringfellow v. Somerville, 95 Va. 701, 29 S.E. 685, 40 L.R.A. 231(1898); Wyatt v. Gleason, 117 Va. 496, 84 S.E. 1009 (1915). Mr. Jones, then, has standing under the most basic common law principles. Stringfellow has been followed as recently as 1971 by Virginia's sister state, West Virginia. Anderson v. Woods, 179 S.E.2d 269, (W.Va.1971).

Nor is there any conflict between the [illegible] and Title 63.1 of the Virginia Code in recognizing Everett Jones as the guardian of Russell Starr. Both Section 63.1-236.1, Distribution and Section 63.1-219, Disposition, repeatedly use either the phrase "parent, guardian, legal custodian or other person standing

in loco parentis" (emphasis added), or the phrase "parent or other custodian." Parents, guardians and persons standing in loco parentis are given equal legal status. The statute will be further analyzed in the argument concerning the 1980 amendment to Title 16.1.

Not only was Mr. Jones Russell Encrr's guardian by maternal appointment, he also stood in loco parentis to the boy. A recent case on the meaning of that Latin phrase (in a different context) was Lyles v. Jackson, 215 Va. 797 (1976). There, in determining whether a stepfather who had not adopted his wife's children was in loco parentis for purposes of parental immunity in a personal injury case, the Court focused on the fact that Jackson held the children out as members of the family and otherwise appeared to discharge parental functions. In a much older case, the Supreme Court focused on emotional familial ties. Doughty v. Doughty, 151 Va. 785, 145 S.E. 349 (1928). See also, Lewis v. United States, 105 F. Supp. 73 (W.D.W.Va., 1952).

Rather than review the voluminous evidence of Everett Jones's paternal relationship to the boy, it should be enough to point out that the Circuit Court, in its Memorandum of Opinion, found that there was evidence that Jones and Lowman were effective parents and also referred to the care and love Mr. Jones and Ms. Lowman gave Russell.

The issue in this case being custody rather than visitation, the reasoning of West v. King would appear to be even more important. In West, evidence was presented that the continued intrusion of the paternal grandmother into the child's mother's home would be psychologically detrimental to the child. How much more detrimental must it be to Russell to be physically torn from the only home he has ever known? The Welfare Department, no matter how well run, is not a parent and is not even, as in West v. King, a relative.

It is true that the Virginia legislature added the following language to Section 16.1-241 in 1980:

> "The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed by any party with a legitimate interest therein."

Although the new language has not been construed by this Court, Professor Walter Wadlington, in the Virginia Law Review, was of the opinion that this change, coupled with a new provision of Code Section 20-107 pertaining to visitation privileges for grandparents and other family members, substantially negated the impact of West v. King. Nevertheless, Professor Wadlington's article stated that the legislative changes "do not seem to alter the general

Virginia rule giving custodial preference to a natural parent in the absence of unfitness or unusual circumstances." (67 Va. Law Rev. 351 at 362.)

The new statutory language of 16.1-241 (A) cries out for interpretation. It grants jurisdiction over "petitions filed by any party with a legitimate interest therein." The question here is whether a Welfare Department may be a party with a legitimate interest absent abuse, neglect, abandonment, and where the Welfare Department has never previously had custody. The clear legislative language needed to arrogate the rights of natural parents referred to in West v. King is simply not present in the 1980 amendment.

Even if it may be assumed that the legislature intended to overrule West v. King with respect to grandparents, step-parents, and the like, it is not at all clear that the changes were sufficient to bestow standing on the Welfare Department in this case. At least one federal court, in an often-cited decision, has stated that a statute that allows the state to intrude upon the home and challenge the child-rearing practices of the family is void for vagueness if it fails to give clear notice of what practices are subject to sanction. Sleeper v. Superior Court of Yolo County, 1969, 302 F. Supp. 18, affirmed 397 U.S. 572 (U.S. Supreme Court, 1970).

Finally, it should be noted that Title 16.1-279, Disposition, when read in pari materia with 16.1-241, indicates that the legislature intended to erect strong protections around the family, even in cases of abuse or neglect. The court is only allowed to transfer the child from the parent, guardian, legal custodian, or other person standing in loco parentis after a finding that there is no less drastic alternative. If the legislature intended to raise such protections for the rights of persons in loco parentis even where a child had been abused or neglected, surely it did not intend to eradicate its protections in the absence of abuse or neglect. If the welfare department is allowed to disrupt the care and parent-child relationship in this case, it seems only logical that it would be allowed to file and pursue similar petitions on similarly situated persons against natural parents as well. No reading of the applicable statutes suggests that the legislature intended such result. Indeed, one must conclude that it intended the opposite.

In the court's opinion, it would [illegible] of Everett Jones by terminating [illegible] relationship between Mr. Jones and [illegible] the absence of any compelling reasons to do so, and a construction of the statute that allowed this result

would render the relevant statutory provisions unconstitutionally vague.

It has long been recognized that there is a constitutionally protected interest in preserving the family unit and raising one's children. Moore v. East Cleveland, 421 U.S. 494 (1976); Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345 U.S. 528 (1953); Myer v. Nebraska, 262 U.S. 390 (1923). The constitutional right of family integrity can only be overridden by a state interest that reaches a significant magnitude. Clearly, the state has an overriding interest in protecting infants and children from abuse and neglect. The state has an equally compelling interest in sheltering homeless children, and in supervising delinquent and ungovernable children. The state does not have a sufficiently important interest in removing children from their homes on the basis of a social worker's vague disapproval of child rearing practices. Given the uncertainties of the child's life after removal, the Welfare Department has the burden of showing that the child will clearly be better off in the custody of the state. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, at 21, 22.

In the Alsager case, the relevant statute of the State of Iowa was found to be impermissibly vague in that it did not clearly delineate those practice that

would give rise to an interference in the home and custody of children by the local welfare department. The Virginia statute, if interpreted to allow the result reached by the Court below, would have to fail on the same constitutional grounds. If the result is reached on other than statutory grounds, it would nonetheless constitute an outrageous and impermissable infringement of constitutional rights of privacy and family integrity under the United States Supreme Court cases previously cited.

C. The Order of the Circuit Court as to the best interest of the child was contrary to the evidence and based upon the wrong standard of proof.

This Court has long held that the burden of showing the existence of circumstances which would deprive a parent of the right to custody of his child is upon the party opposing that right, and evidence of unfitness must be cogent and convincing. Rooks v. Roanoke County Department of Welfare, 218 Va. 515 at 518 (1977).

Since 1977, unfitness as between an actual custodian and a third-party stranger to the child has been clearly defined by statute. Unfitness in such cases must be restricted to the definitions of abuse and neglect, as found in Section 16.1-228A of the Virginia Code:

> "Abused or neglected child" means any child whose parents or other person responsible for his care
>
> 1. Creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a bodily injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental function;
>
> ... provided, however, that no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason also be considered to be an abused or neglected child;

3. Abandons such child; or

4. Commits or allows to be committed any sexual act upon a child in violation of the law.

One glaring fact that emerged from the hearings in this case was that Russell Knorr was never physically abused nor neglected. On the contrary, he has been well fed, well dressed, well cared for in every respect, and given every opportunity available to him for education, religious teaching, and friendship with other children.

community resources available to low-income people. Blanche Lowman did take Russell to church classes, to Head Start, and to the Rappahannock Child Development Center. If there was evidence that Russell lacked some essential service due to economic factors, economic considerations might be relevant, but there was no such evidence.

D. The Court applied the incorrect legal standard to the evidence.

Some of the language used in Circuit Court Judge John Jamison's opinion indicates that he was guided by standards that were not properly applicable to this case.

A great many of the cases on child custody in the Commonwealth of Virginia use the term fitness, stating that a parent found to be unfit would be denied custody. In those cases, however, close analysis shows that fitness was an issue where the two parties both had equal standing to claim legal custody of the child, even in the absence of abuse or neglect. Thus, where two parents have separated, or where a natural parent has previously been divested of custody by court order and another party has been given custody, it has been said that a showing of unfitness would be determinative of which party would gain custody. See, Dyer v. Howell, 212 Va. 453, 184 S.E.2d 789 (1971); McEntire v. Fedfearn, 217 Va. 313, 227 S.E.2d 741 (1976).

Against the overwhelming evidence that Russell was well cared for was the opinion evidence of physchologists and other mental health workers that Russell had aggressive tendencies and some difficulty with impulse control. While such evidence might form the basis for an inference that the parents are less than perfect, it cannot, standing in isolation, constitute the kind of clear and cogent evidence required by Virginia law for the removal from the home that occurred here.

It would appear proper in such custody disputes to consider a great many more aspects of fitness than are taken in by abuse or neglect considerations. Moral fitness, for example, may properly be considered in such cases. Brown v. Brown, 219 Va. 196, (1977). Judge Jamison apparently considered these broader criteria of fitness in his decision in this case. Otherwise, it is difficult to explain one sentence of his opinion, a sentence in which he states that "The Supreme Court of Virginia has stated its position on the question of a child's being awarded to an unmarried couple." Taken literally, such a standard would leave all unwed parents vulnerable to custody suits from Welfare Departments.

It is respectfully submitted that the economic and health factors upon which the Judge relied to find unfitness were not proper considerations under

the circumstances. In this case, the Welfare Department had no prior claim to custody of the child. That being the case, the only "unfitness" test that could properly have been applied by the Court would have been one in which the presence or absence of abuse and neglect were considered. Since the statute gives no consideration to health factors in a more generalized sense, the Court committed reversible error in resting its decision upon consideration of such factors.

XI. CONCLUSION.

The Order of the Circuit Court should be reversed and the child returned to the custody of Everett Jones. The Court below was without jurisdiction in this matter. Moreover, the Court's actions violated Constitutional standards for all the reasons previously presented. The evidence was insufficient as a matter of law, and the wrong standard was applied to the evidence.

If this Court does not reverse the decision of the lower Court, Mr. Jones would ask the Court to remand the case, order the child returned to Everett Jones pending final hearing, and set clear standards to guide the Circuit Court in its deliberations.

For the foregoing reasons, Applicant respectfully asks this Court to grant a Writ of Appeal in this cause.

Respectfully submitted,

EVERETT T. JONES

BY: C. Blackwell Tackney
C. Blackwell Tackney
Counsel for Everett Jones

CERTIFICATE

In accordance with Rule 5:22(b) of the Rules of the Supreme Court of Virginia, I hereby give the following information:

(a) Appellant: Everett T. Jones

Counsel for appellant: C. Blackwell Tackney
Rappahannock Legal Services, Inc.
910 Princess Anne Street
Fredericksburg, Virginia 22401
(703) 371-1105

Appellee: Fredericksburg Department of Public Welfare and Social Services

Counsel for appellee: Ann Palamar
315 William Street
Fredericksburg, Virginia 22401

(b) Counsel for Everett Jones desires to state orally the reasons for granting the petition.

(c) This Petition for Writ of Appeal was delivered to Ann Palamar at the above address on September 10, 1981.

C. Blackwell Tackney
Attorney for Everett Jones

A-76

Charles LeRoy ALSAGER, Sr., and Darlene Lauvern Alsager, Plaintiffs,

v.

DISTRICT COURT OF POLK COUNTY, IOWA (JUVENILE DIVISION) et al., Defendants.

Civ. No. 73-78-2.

United States District Court, S. D. Iowa, C. D.

Dec. 18, 1975.

12

Gordon E. Allen, Iowa Civil Liberties Union, Des Moines, Iowa, and Rena K. Uviller, Burt Neuborne, Melvin L. Wulf, Juvenile Rights Project, American Civil Liberties Union, New York City, for plaintiffs.

Ray A. Fenton, Polk County Atty., and Harold A. Young, Asst. Polk County Atty., Des Moines, Iowa, for defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

HANSON, Chief Judge.

In May of 1970, the Juvenile Division of the District Court of Polk County entered an order terminating the parental rights of Charles and Darlene Alsager in and to five of their six children. In March of 1973, this action was brought attacking the constitutionality of those termination proceedings. The Alsagers seek a declaratory judgment to the effect that Iowa's parent-child termination statute is unconstitutional both on its face and as it was applied to them. Plaintiffs also complain of alleged procedural defects in the state termination proceedings and seek monetary damages from the defendants. Their complaint is based on 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1343(3).

Evidence was presented to this Court, sitting without a jury, in March of 1974. In November, 1974, the Court ruled that the factual situation faced by the plaintiffs was such that federal declaratory relief would be inappropriate. See 384 F.Supp. 443. This ruling was greatly influenced by the Court's fervent belief that the interests of the five children involved in this case could be best served by further proceedings, formal or informal, on the state level. On June 17, 1975, the United States Court of Appeals for the Eighth Circuit ruled that this refusal to proceed to the merits of the plaintiffs' constitutional claims was error. 518 F.2d 1160 (8th Cir. 1975). The case was then remanded to this Court for proceedings consistent with that opinion. Accordingly, the Court acts today, under a mandate.

[1] The Court of Appeals has specifically directed this Court to examine the question of mootness before addressing the merits of plaintiffs' constitutional

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NO 82 5089

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1982

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES)

MOTION FOR LEAVE TO

PROCEED IN FORMA PAUPERIS

COMES NOW EVERETT T. JONES, Appellant, by and through undersigned counsel, and moves for leave to proceed in forma pauperis as provided under Rule 46, Rules of the Supreme Court, and 28 U.S.C. 1915. Leave to proceed in forma pauperis was not sought in any court below. Attached to this motion is appellant's affidavit setting forther with particularity facts showing that he comes within the statutory requirements.

Charles D. Bennett, Jr.
Counsel for Appellant
910 Princess Anne Street
Fredericksburg, Virginia 22401

PROOF OF SERVICE

I, Charles D. Bennett, Jr., hereby certify that a true copy of this Motion for Leave to Proceed in Forma Pauperis was mailed this 19th day of July, 1982 to Ann Palamar, counsel for appellee, 904 Princess Anne St., Fredericksburg, Virginia, and to the Department of Public Welfare and Social Services, P.O. Box 510, Fredericksburg, Virginia.

CHARLES D. BENNETT, JR.

NO . . .

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,
Appellee

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Everett T. Jones, being first duly sworn, depose and say that I am the appellant in the above-entiteld case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

QUESTIONS:	ANSWERS:
1. Are you presently employed?	1. No.
a. If yes, state the amount of your salary or wages per month and give name and address of your employer.	1a. Not applicable.
b. If no, state the date of your last employment and the amount of the salary and wages per month which you received.	1b. I last worked in 1968 and I earned $1.35 an hour or about $475 per month before taxes.

QUESTIONS:	ANSWERS:
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?	2. No. I now receive payments of $318.00 per month from social security.
b. If yes, describe each source of income and state the amount received from each during the past twelve months.	2b. Not applicable.
3. Do you own any cash or checking or savings account?	3. Yes, cash.
a. If yes, state the total value of the items owned.	3a, $100 cash
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?	4. No.
a. If yes, describe the property and state its approximate value.	4a. Not applicable.
5. List the persons who are a dependent upon you for support and state your relationship to those persons.	5. None at this time.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Everett T Jones
EVERETT T. JONES

STATE OF VIRGINIA AT LARGE:

SUBSCRIBED AND SWORN TO before me this 15th day of July, 1982.

Bobbie L Raynes
Notary Public

My commission expires:

June 6, 1986

Office -
F I
AUG 17 1982
ALEXANDER L. STEVAS.
CLERK

No. 82-5089

In The

Supreme Court of the United States

October Term, 1982

EVERETT T. JONES,

Appellant,

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,

Appellee.

On Appeal From The Supreme Court Of Virginia

MOTION TO DISMISS

H. HARRISON BRAXTON, JR. *(counsel of record)*
WILLIS, GARNETT, BRAXTON & ASHBY
315 William Street
P. O. Box 7005
Fredericksburg, Virginia 22404
(703) 373-5033

ANN P. PALAMAR
904 Princess Anne Street
P. O. Box 972
Fredericksburg, Virginia 22404

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In The

Supreme Court of the United States

October Term, 1982

No. 82-5089

EVERETT T. JONES,

Appellant,

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,

Appellee.

On Appeal From The Supreme Court Of Virginia

MOTION TO DISMISS

Appellant, Fredericksburg Department of Public Welfare and Social Services, prays this Court to dismiss this appeal from a judgment of the Supreme Court of Virginia on grounds hereinafter set forth:

JURISDICTION

Jurisdiction in this matter is sought under 28 USC 1257 (2). Appellant moves the Court to dismiss this appeal on the grounds that:

1. It does not present a substantial federal question.
2. Questions sought to be reviewed were not properly raised and were not expressly passed upon.
3. The judgment below rests on a non-federal basis.

STATEMENT OF THE CASE

Lower Court Proceedings

The Fredericksburg Department of Public Welfare and Social Services (hereinafter referred as to "Welfare Department" or "Department") assumed emergency custody of Russell Knorr, then age six (6), on September 26, 1980, pursuant to an emergency removal order entered by the Juvenile & Domestic Relations Court of the City of Fredericksburg after an *ex parte* hearing pursuant to a petition by the department alleging that "the child's custody is in need of determination".

On September 29, 1980, at the conclusion of a hearing at which all parties were represented, the Judge of the Juvenile & Domestic Relations Court returned the child to Everett Jones and ordered further investigation and a full hearing at a later date. That hearing was held on November 13, 1980. The court, at that time, granted custody of Russell Knorr to the welfare department. Everett Jones filed an appeal.

On December 18, 1980, after a hearing on Jones' motion for a preliminary removal order, the Circuit Court of the City of Fredericksburg granted one week visitation to Everett Jones in his home from December 25, 1980, to January 2, 1981.

The case on appeal, *Fredericksburg Department of Public Welfare and Social Services* v. *Everett T. Jones,* was heard by the Circuit Court of the City of Fredericksburg on March 20, 1981, and counsel were permitted to file post hearing memoranda. A memorandum of opinion was issued by the trial judge on May 14, 1981, and a final order was entered by the court on June 10, 1981, granting custody of the child to the local welfare department.

Everett Jones filed his petition for writ of appeal with the

Supreme Court of Virginia in September, 1981. A responsive brief was filed by the welfare department. On April 20, 1982, the Supreme Court of Virginia refused the petition for appeal, finding no reversible error.

Notice of appeal to the United States Supreme Court was mailed by appellant's counsel to appellee's counsel on July 13, 1982, but was never received by counsel for appellee. Appellee, however, received its copy on July 14, 1982. The jurisdictional statement was received by counsel for appellee on July 20, 1982.

Appellee's Statement of Facts

Russell Knorr is the illegitimate child of Helen Knorr. His father is alleged by the mother to be a man named Russell Harding. Shortly after his birth, the mother apparently left the child with neighbors, appellant Everett Jones and his live-in companion, Blanche Lowman.

In December, 1977, the child's mother signed a notarized statement giving her consent for Everett Jones to adopt her son. A petition for adoption was filed by Jones in the Circuit Court of the City of Fredericksburg but was withdrawn when appellee, as the investigating agency under the law, recommended that his petition be denied. The matter was referred to the child protective services section of the welfare department at that time.

In 1978, Helen Knorr signed a statement purporting to name Everett Jones as guardian of the child. The child's father was not a signator nor was any separate document executed by him. No court reviewed the matter.

In 1979, Russell Knorr was evaluated by various personnel at the Child Development Center, to which he had been referred by his pediatrician, Dr. John Painter, because of behavior problems. The child was diagnosed as having

minimum brain dysfunction syndrome (hyperactivity, poor impulse control), which creates a need for special structure and discipline in his life. The caretakers, Jones and Lowman, were advised to seek behavior management counseling to improve their parenting skills. Among the complaints of the caretakers were Russell's fascination with fire and aggressive behavior. The child was later placed on medication to assist in controlling his behavior, although the doctor indicated that the usual treatment was to employ psychological counselors to teach behavior modification techniques for the child to the parents or parent-figures.

Everett Jones did not receive any such counseling, nor did he seek it. Blanche Lowman went once to the Rappahannock Guidance Clinic but, for reasons in dispute, she did not return to seek further counseling.

At about the same time, in March, 1979, respondent welfare department reopened its protective services file on Russell Knorr after a report that he jumped from a second-floor balcony.

In the fall of 1980, both Everett Jones and Blanche Lowman were hospitalized. The child was left in the care of one Mrs. Grimes, who herself sought assistance from the welfare department at that time because she was having difficulty walking. Also, at the same time, it was reported to the welfare department that the child, then six (6) years of age, was wandering alone along the Rappahannock River. Representatives of the welfare department talked with Mr. Jones about placing the child in foster care. Conversations with Joyce Rector, Mrs. Jones' only known relative, indicated she was unable to care for the child.

Appellee filed a petition on September 26, 1980, alleging that the "child's custody is in need of determination". After an *ex parte* hearing, the Juvenile & Domestic Relations

Court entered an emergency removal order, and the child was removed from Mrs. Grimes' home. At a later hearing on September 29, 1980, the child was returned to Everett Jones on a temporary basis and further investigation was ordered by the court.

In October, 1980, Russell Knorr told the resident manager of the apartment complex where he lived with Everett Jones and Blanche Lowman that he had used a lighter to start a fire in a clump of trees behind one of the apartment buildings that day. The incident was reported by the resident manager to the child's babysitter.

A full hearing on the custody petition was held on November 13, 1980, at which time the Juvenile Court entered an order awarding custody to the Fredericksburg Welfare Department. The Circuit Court of the City of Fredericksburg heard the case *de novo* on March 20, 1981. A memorandum opinion was filed by the court on May 14, 1981, and the final order was entered on June 10, 1981, awarding custody to appellee. The judge's memorandum opinion cited the fact that Everett Jones was living with a woman to whom he was not married and that neither party had provided the supervision and "firm loving discipline" which the child required. He found them to be unfit because of "their economic and health conditions *and their inability to fulfill normal parenting responsibilities* (emphasis added)". The memorandum opinion and the final order entered by the Court make clear that the only issue being decided was the temporary custody of Russell Knorr, which was awarded to the welfare department.

The child has remained in foster care since November, 1980, with the exception of a one week visitation in December, 1980-January, 1981.

After the denial of the petition for a writ of appeal by

the Supreme Court of Virginia, the Fredericksburg Department of Public Welfare and Social Services instituted proceedings in the state court to terminate the rights of the natural parents, Helen Knorr and Russell Harding.

Appellant Everett Jones is a sixty-seven year old retired man living on a $266.00 monthly income. He has asthma and is subject to recurrent respiratory infections which require hospitalization from time to time. He cannot walk up a flight of steps or more than a city block without stopping to catch his breath. He has had a meretricious relationship with Blanche Lowman, aged thirty-seven, in the past. He indicates that the sexual nature of the relationship ended at approximately the same time as his surgery for cancer of the prostate. He and Blanache Lowman continued to live in the same household without benefit of marriage. It was apparent from the testimony that much of the daily care of and responsibility for Russell was left to Blanche Lowman, although she is not a party to this suit.

Blanche Lowman is a thirty-eight year old woman with recurrent leg ulcers which require periodic hospitalization. She was described by experts as having a manic condition, characterized by mood swings.

ARGUMENT

(1) This case does not present a substantial federal question. This is a case of temporary custody, not a case of termination of parental rights such as in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), or *Santosky* v. *Kramer,* 50 L.W. 4333 (1982). Appellant is not the father or the reputed father, *Stanley* v. *Illinois,* supra, or a member of the nuclear or extended family, *Moore* v. *East Cleveland,* 421 U.S. 494 (1976), or legal custodian of the child, *Prince* v. *Massachu-*

setts, 321 U.S. 158 (1944). He has attempted, by use of psychiatric evidence, the testimony of a clinical psychologist and several books [*Before the Best Interest of the Child,* J. Goldstein, A. Fraud, A. Solnic (1979 Edition), and *Beyond the Best Interest of the Child,* J. Goldstein, A. Fraud, A. Solnic (1979 Edition)] to elevate his position from that of a caretaker or a person in loco parentis to a natural parent. If this were a termination hearing such as in *Stanley* v. Illinois, supra, or *Santosky* v. *Kramer,* supra, or *Alsegar* v. *District Court of Polk County, Iowa,* 406 F. Supp. 10, 545 F. 2d 1137 (1975), this change to a favored position would be critically important. But, this was not a termination hearing. It was a hearing for temporary custody. Appellant's counsel has cited *Alsegar* v. *District Court of Polk County, Iowa,* supra, and has discussed this case at length; however, counsel has failed to point out that the *Alsegar* case didn't rule on temporary custody. See *Alsegar* v. *District Court of Polk County, Iowa,* supra, at Page 16, Footnote 3:

> "The Court's ruling goes only to state action which permanently destroys the family unit, not to temporary physical separation for the protection of the child. Further, the Court expresses no opinion as to the constitutionality of Iowa's summary removal procedure..."

This case, moreover, does not present a substantial federal question concerning "due process". Virginia Code Section 16.1-241(A)(3) gives the Juvenile & Domestic Relations Court of Virginia jurisdiction to determine the custody, visitation, support, control or disposition of a child "whose custody, visitation or support is a subject of controversy or requires determination".

It is submitted that no allegation need be made other than

"the child's custody requires determination". This was done in the petition filed. Appellant was allowed to attend two separate court hearings, the second being a hearing *de novo*. He was represented by counsel at both hearings, was allowed to testify, have witnesses in his own behalf, and to cross examine other witnesses. Appellant's counsel was present at the time of each of the hearings as was the Appellant. Counsel was aware of the discovery procedure available under the Rules of Court of the Commonwealth, for Appellant's counsel took depositions of various witnesses. Virginia Rules of Court provide for broad discovery, all of which were available to Appellant and his counsel, had there been any question as to the nature of the hearing. Counsel has not alleged that Appellant was surprised by any of the testimony in either court. He is unhappy about the outcome of the case, but so is everyone else involved in this custody case and virtually every other custody case, since the question of custody is never really closed until the child has become self-sufficient. In the meanwhile, parents, guardians, custodians, persons in loco parentis, social service agencies, the State, the courts, and the nation owe it to each child to make that child self-sufficient as soon as possible. A seven year old with special needs cannot afford to wait around while lawyers and courts play with subtle Constitutional niceties. The question at this point must be, and can only be, "What is in the best interest of the child?". In *May* v. *Anderson*, 345 U.S. 528 (1953), at page 536, Mr. Justice Frankfurter observed,

> "Children have a very special place in life which the law should reflect. Legal theories and their phrasing in other cases readily lead to fallicious reasoning if uncritically transferred to determination of a state's duty toward children."

The state's obligation to make determinations of custody from time to time is a responsibility which cannot be shirked and should not present a substantial federal question unless it is clearly wrong on the facts set forth.

(2) The question sought to be reviewed was not properly raised and has not been expressly passed upon. Appellant has cited a number of Virginia statutes but he has not alleged that any of these are repugnant to the Constitution, treaties, or laws of the United States.

Neither the Circuit Court of Fredericksburg nor the Supreme Court of Virginia has made a decision in favor of the validity of any statute. Neither Judge Jamison's Memorandum of Opinion (see Appellant's Index A-1) or the order of the Circuit Court of the City of Fredericksburg (see Appellant's Index A-5) raise Constitutional questions. It is admitted that Appellant's post hearing Memorandum of Law and Appellant's Petition for Writ of Error to the Supreme Court of Virginia make vague Constitutional allusions to the construction of various statutes, but Appellant has never alleged that the statutes themselves were unconstitutional or were repugnant to the Treaties or Laws of the United States. On the contrary, Appellant's counsel in Post Hearing Memorandum of Law, Page 12 (Appellant's Appendix A-40, 41), states "The Virginia Statute, on the other hand, is a model of clarity".

Appellant has cited numerous statutes, yet he has not alleged that any of these statutes are repugnant to the Constitution, Treaties or Laws of the United States, and, accordingly, this action should not fall under Section 28 USC 1257 (2) and should be dismissed.

(3) Finally, the Appellee moves to dismiss this action on the grounds that the judgment below rests on a non-federal basis. The Juvenile & Domestic Relations Court

of the City of Fredericksburg found after preliminary hearing that the custody of Russell M. Knorr should be placed with the Fredericksburg Department of Social Services. Russell Knorr's Guardian ad Litem did not appeal this finding to the Circuit Court of the City of Fredericksburg; however Everett Jones did appeal. The Circuit Court of the City of Fredericksburg found that Everett T. Jones "was not the legal guardian of the child with vested custody rights." (Appendix A-1). Furthermore, the Court found that "Blanche Lowman and Everett Jones are not fit and proper persons within the meaning of Virginia law to have custody of the said Russell Knorr . . ." (Appendix A-1). The finding that Everett Jones was "not a fit and proper person within the meaning of Virginia law to have custody of the said Russell Knorr" should be dispositive of the case.

The Appellee, therefore, respectively moves the Court to dismiss this case for lack of jurisdiction for each of the preceding reasons set forth.

FREDERICKSBURG DEPARTMENT OF WELFARE AND SOCIAL SERVICES

By H. HARRISON BRAXTON, JR.

P. O. Box 7005
Fredericksburg, Virginia 22404

By ANN P. PALAMAR

P. O. Box 972
Fredericksburg, Virginia 22404

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF FREDERICKSBURG

IN RE: RUSSELL KNORR, a child
D.O.B. 1/1/74

(FREDERICKSBURG DEPARTMENT OF
PUBLIC WELFARE AND
SOCIAL SERVICE

vs.

EVERETT T. JONES)

ORDER

This case was heard on March 20, 1981, on a petition of the Fredericksburg Department of Public Welfare and Social Service that the custody of the child, Russell Knorr, was in need of determination. After hearing testimony and considering the written arguments by counsel for petitioner and respondent, the Court makes the following findings:

1. That the Juvenile and Domestic Relations Court of the City of Fredericksburg had jurisdiction to hear and decide this case pursuant to Section 16.1-241A of the Code of Virginia (1950), as amended;
2. That a final order was entered by the Juvenile and Domestic Relations Court of the City of Fredericksburg on November 13, 1980;
3. That this Court has jurisdiction to hear and decide this case on appeal, pursuant to Section 16.1-296 of the Code of Virginia (1950), as amended;
4. That Russell Knorr is the natural child of Helen Knorr, who was present but did not testify at the hearing on March 20, 1981;

5. That, at the time of the original petition, Russell Knorr resided in the City of Fredericksburg;
6. That Everett Jones and Blanche Lowman are not legal guardians of this child with vested custody rights;
7. That Everett Jones and Blanche Lowman are not married and, although the evidence indicates they have not had sexual relations in five years, they live together as two adults of the opposite sex.
8. That Blanche Lowman and Everett Jones are not fit and proper persons, within the meaning of Virginia law, to have custody of the said Russell Knorr; and,
9. That it is in the best interests of the child, Russell Knorr, that his custody be awarded to the Fredericksburg Department of Public Welfare and Social Service.

WHEREFORE, the Court does ORDER that custody of Russell Knorr shall be and hereby is granted to the Fredericksburg Department of Public Welfare and Social Service.

ENTER THIS:

JOHN A. JAMISON, *Judge*

Date: June 10, 1981

I ASK FOR THIS:

ANN P. PALAMAR
Counsel for Fredericksburg Department of Public Welfare
P. O. Box 972
Fredericksburg, Virginia 22401

SEEN:

C. BLACKWELL TACKNEY
Counsel for Everett Jones
RAPPAHANNOCK LEGAL SERVICES, INC.
910 Princess Anne Street, 2nd Floor
Fredericksburg, Virginia 22401

CERTIFICATE OF SERVICE

I, Ann P. Palamar, Associate Counsel, hereby certify that pursuant to Rule 28, three copies of this Motion to Dismiss were delivered to the office of Charles D. Bennett, Jr., Esquire, counsel for Appellant, Rappahannock Legal Services, 910 Princess Anne St., Fredericksburg, Virginia 22401, and were "delivered to him personally" or "delivered to an employee therein", on the 17th day of August, 1982.

Ann P. Palamar

ANN P. PALAMAR

AFFIDAVIT

Before me, the undersigned authority, this day appeared Ann P. Palamar, who, upon her oath, states that the facts set forth in the above Certificate of Service are true to the best of her knowledge and belief.

Diane Converse

Notary Public

My Commission expires: 7-15-83